

LIL
SUPREME COURT

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 356

EMANUEL BROWN, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 8, 1957

CERTIORARI GRANTED APRIL 7, 1958

SUPREME COURT OF THE UNITED STATES

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No.

UNITED STATES OF AMERICA, Appellee,

v.

EMANUEL BROWN, Appellant.

APPENDIX TO APPELLANT'S BRIEF

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES

v.

EMANUEL BROWN

Crim. No. C 152-265

DOCKET ENTRIES

Violation—Contempt of Court. Refusal to answer
questions before Grand Jury.

Date	Cash	Acct.	Deft.	Rec'd	Disb.
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4-9-57	Emanuel Brown		5.—	
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4-12-57	Pd. U. S. Treas.			5.—
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Dated	Proceedings by the Court
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4-8-57	Emanuel Brown having been directed by the Court to answer certain questions put to him by the Grand Jury, and having refused to answer said questions, the government moved to
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**Proceedings in the United States Court of Appeals
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[fol. A]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No.

UNITED STATES OF AMERICA, Appellee,

v.

EMANUEL BROWN, Appellant.

APPENDIX TO APPELLANT'S BRIEF

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE
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v.

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Date	Cash Acct. Deft.	Rec'd	Disb.
4- 9-57	Emanuel Brown	5.—	
4-12-57	Pd. U. S. Treas.		5.—

Dated Proceedings by the Court

4- 8-57 Emanuel Brown having been directed by the
Court to answer certain questions put to him
by the Grand Jury, and having refused to an-
swer said questions, the government moved to

have Emanuel Brown adjudged guilty of contempt of Court. The Court adjudges the witness Emanuel Brown guilty of contempt of Court.

LEVET, J.

- 4- 8-57 Filed certificate and Order adjudging Emanuel Brown guilty of contempt of Court and sentencing him to imprisonment for a period of One Year and Three Months at a place of confinement to be designated by the Atty Genl.

LEVET, J.

- [fol. 2] 4- 8-57 Emanuel Brown to surrender for service of sentence on 4-9-57 at 4 PM. Released on own recognizance.

LEVET, J.

- 4- 8-57 Issued certified copies of order to U. S. marshal.

- 4- 9-57 Emanuel Brown surrenders to U. S. Marshal.

- 4- 9-57 Filed notice of appeal to the US CA.

- 4-16-57 Defendant's attorney moves for bail pending appeal. Motion granted. Bail fixed at \$5000. on consent of government and defendant's motion enlarging bail limits to New Jersey is granted.

LEVET, J.

- 4-16-57 Filed a true copy of order received from the US CA.—Ordered that bail be and it hereby is granted in a sum to be fixed by the U.S. Dist. Court for the So. Dist. of NY. Further ordered that the argument of the appeal be and it hereby is set for May 6th, 1957. Further ordered that in the event that the appellant's record, brief and appendix are not filed by May 2, 1957, appellant will become subject to being taken into custody once more. A. DANIEL FUSARO, Clerk.

- 4-17-57 Filed transcript of record of proceedings dated April 5, 8, 1957.

[fol. 3]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER APPEALED FROM—April 8, 1957

Emanuel Brown, having appeared before the United States Grand Jury for the Southern District of New York on April 5, 1957, and having refused to answer certain questions, and on April 5 and April 8, 1957, a hearing having been had, and Wegman, Epstein & Burke, Esqs., Myron L. Shapiro, Esq., of counsel, for the defendant, and Paul W. Williams, United States Attorney for the Southern District of New York, by Herbert M. Wachtell and Charles H. Miller, Assistant United States Attorneys, of counsel, for the United States of America, having been heard, and the defendant having been directed to answer said questions by the Honorable Richard H. Levet, United States District Judge for the Southern District of New York; and the defendant having again appeared before the United States Grand Jury for the Southern District of New York on April 8, 1957, and having refused to answer said questions as directed by the Court, and having again appeared before the Honorable Richard H. Levet on April 8, 1957, and having refused to answer said [fol. 4] questions when put to him by the Court; and Wegman, Epstein & Burke, Esqs., Myron L. Shapiro, Esq., of counsel, for the defendant, and Paul W. Williams, United States Attorney for the Southern District of New York, by Herbert M. Wachtell and Charles H. Miller, Assistant United States Attorneys, of counsel, for the United States of America, having been heard, and due deliberation having been had thereon, and upon all proceedings heretofore had herein; it is

Ordered, that in pursuance of Rule 42(a) of the Federal Rules of Criminal Procedure, the defendant, Emanuel Brown, hereby is found to be in contempt of this Court for violation of Title 18, United States Code, Section 401(3), and is hereby committed to the custody of the

Attorney General, or his authorized representative, for imprisonment for a period of one year and three months.

Dated: New York, N. Y., April 8, 1957.

Richard H. Levet, U. S. D. J.

4/8/57.

Defendant to surrender to U. S. Marshal on 4/9/57 at 4 P.M. Released on own recognizance.

Levet, J.

[fol. 5]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CERTIFICATE OF DISTRICT JUDGE PURSUANT TO RULE 42(A) OF
THE FEDERAL RULES OF CRIMINAL PROCEDURE—
April 8, 1957

In accordance with Rule 42(a) of the Federal Rules of Criminal Procedure, I hereby certify that the following acts were committed in the presence and the hearing of the Court and constitute a contempt of the Court:

On April 5 and 8, 1957, the defendant Emanuel Brown was brought before me and in the presence of the United States Grand Jury for the Southern District of New York, certain questions were read, and the defendant claiming that he was privileged to refuse to answer said questions on the ground of self-incrimination, and after a hearing was had in which it was established that the said Grand Jury was conducting an investigation under Chapter 8 of Title 49, United States Code, and that the said defendant had been called to testify as a witness in the said investigation, and after hearing arguments by Wegman, Epstein & Burke, Esqs., Myron L. Shapiro, Esq., of counsel, for the defendant, and Paul W. Williams, United States Attorney for the Southern District of New York, by Herbert M. Wachtell and Charles H. Miller, Assistant United States Attorneys, of counsel, for the United States of America, and in view of the provisions of Title 49, United States Code, Sections 46 and 305(d), I directed the defendant to answer those questions.

On April 8, 1957, Emanuel Brown was again brought before me and in the presence of the United States Grand Jury for the Southern District of New York, I put to him the same questions which he refused to answer after having been directed to do so and failed to state any valid [fol. 6] reason why he should not be held in contempt of this Court. The questions which were asked are as follows:

"Q. Mr. Brown, are you associated with Young Tempo, Incorporated?

Q. Mr. Brown, does Young Tempo, Incorporated, use a trucking company known as the T and R Cutting Company or as the T & R Trucking Company?

Q. Mr. Brown, who do you know to be the owner or owners or the principal in interest or principals in interest of the T and R Cutting or the T and R Trucking Company?

Q. Mr. Brown, are you associated with the Acme Dress Company in Midvale, New Jersey?

Q. Mr. Brown, does the T and R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?

Q. Mr. Brown, do you know if the T and R Trucking Company or the T and R Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey?"

Accordingly, in pursuance of Rule 42(a) of the Federal Rules of Criminal Procedure, I summarily found Emanuel Brown in contempt of this Court and committed him to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year and three months.

Dated: New York, N. Y., April 8, 1957.

Richard H. Levet, U. S. D. J.

[fol. 7]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter
of

EMANUEL BROWN, a witness before the April 1957
Grand Jury.

Before—Hon. Richard H. Levet, District Judge.

Transcript of Proceedings of April 5, 1957

APPEARANCES:

Paul W. Williams, Esq., United States Attorney, for
the Government; by Herbert M. Wachtell, Esq.,
and Charles H. Miller, Esq., Assistant United
States Attorneys.

Myron L. Shapiro, Esq., Attorney for the Witness.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Outline what you state is the procedure.
This is public, I presume.

Mr. Wachtell: It is the procedure that the courtroom
should be cleared except the necessary personnel.

The Court: I will direct the marshal to clear the court-
room if there are persons who have no business here.

(The courtroom was cleared of all but the interested
parties.)

Mr. Wachtell: If your Honor please, the April 1957
regular Grand Jury, requests that the aid and assistance
[fol. 8] of the Court in a direction to a witness, Emanuel
Brown, who has appeared before the Grand Jury in a matter
now under investigation, and who has refused to answer
certain questions put to him on the ground that answers
thereto might tend to incriminate him.

It is the position of the Government, if I may briefly refer to it, that the matter under investigation by the Grand Jury is an alleged violation of certain provisions of the Motor Carriers Act of the Interstate Commerce Law.

As provided under Section 305(d) of Title 49, which is included in the Motor Carriers Act, there is a section providing for immunity from prosecution for any witness who testifies in a matter arising out of an investigation, immunity as to any matter arising out of the subject matter of his testimony.

Mr. Shapiro: If your Honor please, I am sorry to interrupt Mr. Wachtell, but if he is proceeding directly to the hearing, I would like to put my position on the record. However, if we are continuing colloquy on the record, rather than off the record, I will not interrupt him.

Mr. Wachtell: I am going to get to the procedural question in a moment.

This witness, as I have stated, now appears before the Court with the Grand Jury, the Grand Jury making a request of the Court that he be directed to answer certain questions. The Government feels that at this time the witness is present and he is accompanied by his attorney here in court, and at this time he is entitled to a full hearing as to any issues of fact or law which may be raised as to why he should not be directed to answer these questions.

[fol. 9] The Government, in connection with its position, will refer to the case of *Carlson v. United States* in the First Circuit, 209 Fed. 2d 209, and there are cases in this circuit such as *United States v. Curcio*, *United States v. Trock*, *United States v. Gordon* and *United States v. Courtney*, in all of which the procedure which the Government is now requesting has been followed in the District Court and has been expressly or tacitly approved in the Court of Appeals.

The Government would further request that at the termination of this hearing, if the Court determines that the witness in fact must answer the questions, that the Court direct him to answer the questions. At that point it would be the Government's intention to have the Grand Jury

and the witness return to the grand jury room, at which point the same questions would be put to the witness.

Should he refuse to answer there, the Government would again request the Grand Jury and the witness to come before the Court, at which point the Government would request the Court once again to put the same questions to the witness, and should the witness at that point refuse to answer the questions, the Government would ask that he be held summarily in contempt, according to the procedure of Rule 42(a) of the Federal Rules of Criminal Procedure, and for a violation of Section 401, subdivision 3, which makes punishable as contempt the disobedience of a lawful order of the court. Again this is the procedure that was followed in the cases that I have cited to your Honor. There is only one other fact that I would wish to refer to at this point, and that is that on March 25th, which was last week, Mr. Miller, of the United States Attorney's office, and I had a conference with Mr. Shapiro, the attorney for the witness Brown, at which time Mr. [fol. 10] Shapiro was advised that the Government would have Mr. Brown before this Grand Jury in the matter that is now pending and that the Government would ask that he be compelled to answer the questions and would proceed, if necessary, to compel him to answer such questions.

The Court: Would you outline briefly, if it is proper at this time, the general nature of the inquiry. You said it was related to certain shipments.

Mr. Wachtell: Yes, your Honor, we can do that under my statement, or if we get over the procedural hurdle, we can call the Grand Jury reporter.

The Court: Just a very brief sketch.

Mr. Wachtell: Very briefly, the witness Emanuel Brown, is a principal in interest of Young Tempo, Inc., which is a garment manufacturing firm, a dress manufacturing firm, here in New York City. It is the Government's information that Young Tempo, Inc., has used in the past as a trucking company the T & R Trucking Company or the T & R Cutting Company. Apparently, both names have been used for this company.

This trucking company, it is the Government's information, has trucked dresses for Young Tempo, Inc., and for an affiliated company, the Acme Dress Company of Midvale, New Jersey, between Young Tempo here in New York and Acme in New Jersey.

It is further the Government's information that this T & R Trucking Company is in fact owned by one John Dioguardi, though nominally in the name of Theodore Rij. It is further the Government's information that contrary to law this T & R Trucking Company neither applied for nor received a permit from the Interstate Commerce Commission to operate as a contract truck between New York, New York, and Midvale, New Jersey. [fol. 11] That is the matter that is now before this Grand Jury.

The Court: Very well.

Mr. Shapiro: If your Honor please, in view of the statements by Mr. Wachtell prior to the time that he went on the record that the Government's position was that this was the only hearing we were entitled to, I hereby apply and request that we have a reasonable adjournment and a notice from the Government of the specifications or charges for which we are having this hearing so that we can prepare for this hearing and be able to properly represent our client.

The Court: I do not think you are entitled to it under the rule.

Mr. Shapiro: I respectfully except.

Mr. Wachtell: As a practical matter, your Honor, I do not know what Mr. Shapiro could be told at this time other than what he was told way back in March, on March 25th. It is a simple matter. I think there were five or six questions put to the witness before the Grand Jury. The witness declined to answer each of them on the ground that it might tend to incriminate him.

He was advised that in view of the fact that the immunity statute applied here and it was a valid immunity statute, the Fifth Amendment plea could not be interposed.

He was permitted freely to leave the grand jury room and consult with his attorney upon each request that he made.

I advised Mr. Shapiro way back on March 25th that when the witness appeared before the Grand Jury it was going to be as I have stated. I advised him that this ICC investigation was going to be under way. The witness was served with a subpoena specifying the section [fol. 12] of the Interstate Commerce Act which the Grand Jury was investigating. I specifically told Mr. Shapiro, called his attention to the immunity statute that the Government intended to utilize, and the sole matter was whether the witness should be directed to answer these questions.

The Court: I do not see any reason for further delay.

Mr. Shapiro: I respectfully except, your Honor.

I would like the record, so far as this conference of March 25th is concerned, as far as I was concerned and am concerned, that was merely a statement of the Government's legal position to me, and I do not see how it bears on the issue as to whether we should have at this point an adjournment and a notice in order to prepare for the hearing which we are told is the only hearing that we are going to have.

Mr. Wachtell: May I inquire through the Court whether we could have an offer of proof as to what counsel would endeavor to establish at this hearing? Perhaps there might be a different situation here.

The Court: Yes. What is the proof?

Mr. Shapiro: There are a number of things which it might be necessary to investigate as a matter of preparation. There are also legal questions which have to be further examined in order that this man may be adequately represented. This is not just a grand jury which is appearing out of the blue, to investigate this man. This man was eleven times before another grand jury, and he is still under subpoena before another grand jury investigating the aspects of all of these companies and individuals mentioned by Mr. Wachtell. So the situation is not as simple—not simply an investigation of the interstate commerce, the possible interstate commerce violation. It has ramifications. I respectfully state to the Court as an attorney [fol. 13] that in order to prepare properly for this hearing, I require additional time.

The Court: What additional testimony would you adduce?

Mr. Shapiro: I would like to look into the question as to whether I can compel the production of the grand jury minutes of prior investigations to ascertain the purpose of this investigation. I would like further to look into the law.

The Court: How could the first point you mention shed any light on this problem.

Mr. Shapiro: Because in my opinion, your Honor, this grand jury investigation is being used as a means of circumventing the exercise by my client of the privilege before the other grand jury and for the further reason that I am not convinced as yet, contrary to Mr. Wachtell's statement, that he does obtain immunity by this testimony.

The Court: Give me that section.

Mr. Wachtell: 305, subdivision (d) Title 49.

The Court: Is that all?

Mr. Wachtell: If I may read to your Honor beginning about midway down the section, and commencing after the semicolon: " * * * and any person subpoenaed or testifying in connection with any matter under investigation under this chapter" and, parenthetically, that refers to the Motor Carriers Act, "shall have the same rights, privileges and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title" and that refers to the railroad section of the interstate commerce statute, "unless otherwise provided in this chapter."

[fol. 14] Then, your Honor, referring to Title 49, U. S. Code, Section 47, which is in Title 1, it provides:

"No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of alleged violation of chapter 1 of this title on the ground or for the reason that

the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding."

And then it continues to say that the statute does not refer to perjury committed in the testimony itself.

The Court: You contend that those sections taken together give immunity to this witness?

Mr. Wachtell: Quite definitely, your Honor.

The Court: What is the question about it then? What is the legal question?

Mr. Shapiro: I do not find it as easy to say as Mr. Wachtell does that both of these sections together give immunity. May I have that, please?

[fol. 15] Mr. Wachtell: Yes (handing).

Mr. Shapiro: 305(d), which is part of the Motor Carriers Act, enacted many years after chapter 1 of the Interstate Commerce Commission Act, provides with respect to the duties and powers of the Commission to investigate possible violations of the Interstate Commerce Act.

The Court: You mean that does not cover a grand jury?

Mr. Shapiro: It does not cover a grand jury, in my opinion, your Honor, because the language is related, and it can only be taken to mean that the immunity intended to be granted under 305(d) applies only to investigations before the Commission, and Congress did not intend under this section to extend it to grand jury investigations.

Now there are other sections of the Interstate Commerce Act where Congress incorporated by reference the immunity section, referring to Section 1017. I think they have different numbers in the United States Code Annotated.

Mr. Shapiro: In 916(a).

The Court: Title 49?

Mr. Shapiro: Title 49, dealing, I believe, with water carriers or forwarders—water carriers—“ * * * the provisions of Section 1217 and 46-48 of this title shall apply with full force and effect in the administration and enforcement of this chapter.”

And in 1017(a) they say “The provisions of Section 1217 of this title, together with such other provisions of chapter 1 of this title as may be necessary for the [fol. 16] enforcement of such provisions, and of Sections 46-48 of this title * * * shall apply with full force and effect in the administration and enforcement of this chapter.”

There are in these two sections, 916(a) and 1017(a) quite a difference in the language used by Congress.

There is no dispute that if this investigation were brought under 916(a) and 1017(a) that Mr. Wachtell would be correct, because Congress intended to extend this immunity through the Motor Carriers Act.

305(d) starts off “So far as may be necessary for the purposes of this chapter, the commission and the members and examiners thereof and joint boards”—no reference to grand juries, prosecutor or attorney general or U. S. attorney—“shall have the same power to administer oaths and require by subpoena the attendance and testimony of witnesses and the production of books, et cetera, and to take testimony by deposition relating to any matter under investigation as the commission has in a matter arising under chapter 1 of this title.”

That is the only power of investigation granted under the statute here to the Commission, and then it says, “Any person subpoenaed or testifying in connection with any matter under investigation,” and they use the exact same language as appeared in the prior clause, “shall have the same rights, privileges and immunities * * * as though such matter arose under chapter 1 of this title.”

I say that under 305(d) the immunity provision does not extend to a grand jury investigation and can only be held or restricted to investigations before the commission.

That is why we claim in the first instance that our client here, the respondent or whatever you want to call him, does not have immunity despite Mr. Wachtell's claim. [fol. 17] There are other grounds, but I do not know whether at this point I ought to go into them.

Mr. Wachtell: I would first point out, your Honor, that Mr. Shapiro's statement shows that he is clearly and fully prepared on the question of the law, which is the only question before the Court. I say that as a preface. Here the only question is interpretation of the statute, and the statute is completely unambiguous. Mr. Shapiro's citation of other sections of the interstate commerce law concern water carriers and Sections 916 and 1017 involve different methods of transportation, and where there are likewise, references to the incorporation of the immunity statute, merely show quite clearly that the prevailing congressional intent, and I state that the provisions of intent in the motor carriers section and the water carriers section and the other sections which came after the railroad, the initial section of the interstate commerce law, that its intent was to stick as closely as possible and exactly to the same the administrative structure and remedies and enforcement methods as existed under the enforcement of the railroad section initially.

As a matter of fact, Section 46, which I read, is the prototype of the immunity section, not only for the sections of the interstate commerce law, but that has been the prototype and the immunity section which has subsequently been incorporated by reference generally through the federal law.

When World War II came along and Congress enacted the OPA statute, they went right back to Section 46 and incorporated that by reference as to immunity, and the reason for that is that Section 46 was the first valid Congressional immunity statute and was upheld by the Supreme [fol. 18] Court in *Brown v. Walker*, which, incidentally, is a grand jury contempt case, and subsequently the Congress of the United States by reference to this continued to refer back to this Section 46 whenever it wanted to pass one of these general immunity statutes.

Mr. Shapiro is quite——

The Court: In other words, there has been legislative recognition of the effect of the Brown case?

Mr. Wachtell: Correct. The original ICC statute—immunity statute was invalid and held invalid in the case of Counselman v. Hitchcock. Subsequently Congress amended the immunity statute to make it broad enough to cover the constitutional privilege and the statute was then upheld in Brown v. Walker. Subsequently that has been the prototype and the model for further Congressional immunity statutes.

Mr. Shapiro is quite accurate when he says that subsection (d) of 305 starts off with the powers of the Commission. That subdivision (d) is quite clearly in two parts, and the two parts are split by the semicolon. Of course that subsection (d) does not give power to the grand jury or the courts. They already have that. They have the power to subpoena witnesses and compel testimony without any grant of authority by the Interstate Commerce Commission Act. It did start off by saying that the Commission, under the motor carriers section, shall also have the power to subpoena witnesses, et cetera. Then there is a semicolon, and the section goes on " . . . and any person subpoenaed or testifying in connection with any matter under investigation under this chapter," but it does not say any matter under investigation by the Commission. [fol. 19] The Court: That is broad.

Mr. Wachtell: It says "any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities and penalties as though such matter arose under chapter 1 of this title."

The only thing that we can find as to chapter 1 is that it states the witness is entitled to immunity, which is in Section 46, which had previously been passed and recognized and upheld by the courts, and it is quite clear what they are referring to there.

The Court: Are there any other substantial legal questions?

Mr. Shapiro: Yes. I would like to make more reference to this. In the matter under investigation as contained in the first clause of this—

The Court: Is that so? Does it say so by those words?

Mr. Shapiro: It says in the first clause "any matter under investigation," referring to the power of the Commission, and then in the second clause it says "any person subpoenaed or testifying shall have the same rights" in connection with any matter under investigation under that chapter. Therefore there is a repetition in the second clause of the exact language in the first clause. I say that necessarily that is limited to investigations by the Commission, and is a principle of statutory construction. The words "with any matter under investigation, under this chapter," to that must be added the words "brought by the Commission," because I think that is a necessary implication of the statutory construction.

The Court: Are you familiar with the *Brown v. Walker* case?

[fol. 20] Mr. Shapiro: I am, your Honor.

The Court: Wasn't that a case where there had apparently been this point raised, to that effect?

Mr. Shapiro: No, not the point that I am raising.

The Court: He is applying it to a grand jury investigation. Congress passed legislation afterwards and the rule of statutory adoption prevails, doesn't it?

Mr. Shapiro: You have two questions here, your Honor. You have the question as to whether Congress has properly or sufficiently incorporated by reference Section 46 of the Interstate Commerce Act into this section.

The other question in *Brown v. Walker*—I have examined it—and the argument was not raised, and I say to your Honor that there is very serious question in my mind as to the language of Section 46 as to whether it clearly applies the immunity part to the grand jury investigation. The question was not argued in *Brown v. Walker*. That was not the issue before the Court, as I read from the report of the law edition, I do not see any point raised there as to whether it applied to a grand jury investigation.

I would like also to point out to your Honor that 305(d) states "So far as may be necessary." This section also concludes "unless otherwise provided in this chapter." I think that Mr. Wachtell will agree with me that it is

elementary that the immunity must be as broad as the privilege in order to be effective. Where the statute says "So far as may be necessary for the purposes of this chapter," and then says "unless otherwise provided in this chapter," it would seem to me quite clear that even if you took Section 46 into this section, that the immunity [fol. 21] cannot be as wide as the privilege because necessarily the statute says "So far as may be necessary for the purposes of this chapter," may very well operate to limit the immunity, and this man might unwittingly put himself in the position where, by failing to claim the privilege, he would be giving incriminating testimony.

The Court: Is that all on that particular point?

Mr. Shapiro: On that particular point.

The Court: What else?

Mr. Shapiro: With respect to the question of law, I think it is a mixed question of law and fact, but I do not think Mr. Wachtell would dispute the facts that, I think, a year ago——

Mr. Wachtell: May I suggest that we call the reporter and have the record read, the reporter for the grand jury.

The Court: Yes, let the record be read and we will proceed, if necessary, or take an adjournment. It is approaching the noon hour anyway.

[fol. 22] MARGARET D. CONNOLLY, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wachtell:

Q. Mrs. Connolly, are you a grand jury reporter duly sworn and authorized to take testimony before grand juries in the Southern District of New York?

A. I am.

Q. Were you performing your functions in that regard before the April 1957 regular grand jury this morning?

A. Yes.

Q. And did you make stenographic notes of the testimony of the witness Emanuel Brown?

A. Yes.

Q. And those stenographic notes, to the best of your ability, represent a true record of the proceedings with reference to the witness Emanuel Brown?

A. Yes.

Q. Would you read them to the Court.

A. From the beginning?

Mr. Wachtell: Yes.

The Court: And will you speak up so that we can all hear you.

The Witness: Yes, sir.

"Q. Will you state your full name, sir, for the record.

"A. Emanuel Brown, 1960 East Tremont Avenue, Bronx 62, New York.

"Q. Mr. Brown"—

Q. May I interrupt? Was the witness previously sworn?

A. Yes, the witness was sworn by the foreman.

"Q. Mr. Brown, have you come here today with your attorney?

"A. Yes, I have.

"Q. What is your attorney's name, sir?

"A. Mr. Shapiro.

[fol. 23] "Q. Is that Myron Shapiro?

"A. That's right.

"Q. Is Mr. Shapiro in the anteroom outside of this grand jury?

"A. Yes, sir.

"Q. I would advise you, sir, that I am sure the foreman, should the occasion arise, will at reasonable intervals allow you to consult with your attorney if you feel you desire to do so.

"A. Thank you.

"Q. Mr. Brown, have you received a subpoena, grand jury subpoena calling for your appearance before this grand jury?

"A. Yes, sir.

"Q. Do you have the grand jury subpoena card with you?

"A. Yes, sir.

"Q. May I have that please, sir. May the record note that the card that has been handed up to me by Mr. Brown is a copy of a subpoena calling for Mr. Brown's appearance before the United States Grand Jury. The subpoena was originally returnable on April 3rd but I will state that in consultation with Mr. Brown's attorney and upon his attorney's request the appearance was then fixed for today, April 5th. The subpoena further states that Mr. Brown is directed to appear before this grand jury, and now I quote, 'to testify all and everything which you may know in regard to an alleged violation of Sections 309, 322, Title 49, United States Code.'

"I return this card to you, Mr. Brown.

"Mr. Brown, are you associated with Young Tempo, Incorporated?

"A. May I speak to my attorney, please?

"Mr. Wachtell: Yes.

"The Foreman: Yes.

"(Witness goes out of room.)

"(Witness returns.)

[fol. 24] "Q. Mr. Brown, you understand, of course, that you are still under oath?

"A. Yes, sir.

"Q. Have you consulted with your attorney?

"A. Yes, sir.

"Q. Could we have the question read.

"Question read as follows:

"Q. Mr. Brown, are you associated with Young Tempo, Incorporated?

"A. I refuse to answer because by answering I may tend to incriminate myself.

"Q. Mr. Brown, I will advise you at this time that this grand jury is conducting an investigation for possible violations of the Interstate Commerce Commission laws, specifically, the sections that were specified on the subpoena served upon you and which I have read into the record previously. I will further advise you, sir, that under Title 49, United States Code, Section 305(d), The

Congress of the United States has provided that any witness who is compelled to give testimony as to any matter arising under the Motor Carrier Section of the Interstate Commerce laws which includes the sections involved in the present grand jury investigation, the Congress of the United States has provided that any such witness shall by virtue of his testimony be given immunity from federal prosecution as to any crime which might arise out of the subject matter of his testimony. Now that granting of immunity is as broad as the constitutional protections which you would otherwise have under the Fifth Amendment. Consequently, as by your testimony here you will receive such a grant of immunity, I will advise you and as I am sure you know—I have previously discussed this matter with your attorney, Mr. Shapiro—[fol. 25] I will advise you that you do not have any privilege to plead the Fifth Amendment as to the questions which are going to be put to you before this grand jury. Accordingly, sir, I will now ask that the Foreman direct you to answer that question.

“Foreman: As requested, will you answer that question?”

“Witness: May I see my attorney again, please?”

“Mr. Wachtell: I would suggest it, Mr. Foreman.

“Foreman: Go ahead.

“Witness: Thank you.

“(The witness goes out.)

“(The witness returns.)

“Q. Mr. Brown, you understand again, of course, that you are still under oath?

“A. Yes, sir.

“Q. Have you consulted with your attorney?”

“A. Yes, sir.

“Q. Madam Reporter, may we again have the question read.

“(Stenographer reads: ‘Mr. Brown, are you associated with Young Tempo, Incorporated?’)

“A. I still respectfully refuse to answer that question.

“Q. So that the record may be clear, Mr. Foreman, may I again ask that the witness be directed to answer the question.

"Foreman: As requested, do you still refuse to answer the question?

"Witness: Yes, sir.

[fol. 26] "Q. Upon what ground, sir?

"A. The grounds of self-incrimination.

"Q. Have you understood the statement that I've previously made, sir, that under the law you may not claim that privilege here today?

"A. I understood what you told me.

"Q. Do you further understand that under these circumstances you may be brought before a judge of this court and directed to answer this and other questions?

"A. If you tell me that, yes.

"Q. Do you further understand that should a judge of this court agree that you are required to answer these questions, and should you persist thereafter in refusing, you may be held in contempt of court?

"A. May I consult with my attorney on that?

"Mr. Wachtell: Yes.

"Witness: Thank you.

✓ "(The witness goes out.)

"(The witness returns.)

"Q. Again, Mr. Brown, you understand that you are still under oath?

"A. Yes, sir.

"Q. And again, have you consulted with your attorney?

"A. Yes, sir.

"Q. Are you prepared to answer the question?

"A. Would you read that question to me again, please?

"(Stenographer reads: 'Q. Mr. Brown, are you associated with Young Tempo, Incorporated?')

"A. Is that the question you had reference to or the last question?

"Q. I believe that that is the only question that has been put to you, sir, after the few preliminaries as to [fol. 27] whether you were served.

"A. My answer on that is still the same. I refuse to

answer because by answering I may tend to incriminate myself.

"Q. Mr. Brown, does Young Tempo, Incorporated, use a trucking company known as the T and R Cutting Company or as the T & R Trucking Company?

"A. I refuse to answer because by answering I may tend to incriminate myself.

"Mr. Wachtell: Mr. Foreman, on the same grounds, I will ask that the witness be directed to answer the question.

"Foreman: You have heard the request. Do you still refuse to answer the question?

"Witness: I still refuse.

"Mr. Wachtell: Mr. Foreman, so that the record could be clear, could it be sure that he is being directed in so many words by the Foreman to answer the question.

"Foreman: Will you answer the question as put to you?

"Witness: I still refuse to answer the question, sir.

"Q. Mr. Brown, who do you know to be the owner or owners or the principal in interest or principals in interest of the T and R Cutting or the T and R Trucking Company?

"A. I refuse to answer because by answering I may tend to incriminate myself.

"Mr. Wachtell: Mr. Foreman, again may the witness be directed to answer?

"Foreman: As Foreman of this Grand Jury, I direct you to answer that question.

[fol. 28] "Witness: I refuse to answer under the same grounds.

"Q. Mr. Brown, are you associated with the Acme Dress Company in Midvale, New Jersey?

"A. I refuse to answer because by answering I may tend to incriminate myself.

"Mr. Wachtell: Mr. Foreman, again may the witness be directed to answer?

"Foreman: As Foreman of this jury I direct you to answer the question put to you.

"Witness: I refuse to answer on the same grounds, sir.

"Q. Mr. Brown, does the T and R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?

"A. I refuse to answer because by answering I may tend to incriminate myself.

"Q. Again, Mr. Foreman—

"Foreman: As Foreman of this jury, I direct you to answer the question as put to you.

"Witness: I refuse on the same grounds, sir.

"Q. Mr. Brown, do you know if the T and R Trucking Company or the T and R Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey?

"A. I refuse to answer because by answering I may tend to incriminate myself.

"Mr. Wachtell: Mr. Foreman—

"Foreman: As Foreman of this jury I direct you to answer the question as put to you.

[fol. 29] "Witness: I refuse on the same grounds.

"Mr. Wachtell: Mr. Foreman, may we have the witness excused temporarily to remain outside of this grand jury for further instructions?

"Foreman: You're excused, please.

"Witness: Yes, sir.

"(The witness goes out.)"

Mr. Wachtell: No further questions.

(Witness excused.)

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Would this grand jury have normally remained this afternoon?

Mr. Wachtell: They would not, your Honor.

The Court: When would the next day be?

Mr. Wachtell: If they are to attend to this matter, it would be Monday morning.

The Court: Are there other witnesses to be heard before the grand jury Monday morning?

Mr. Wachtell: No, there are not.

The Court: I do not want to keep them this afternoon unless it is imperative to have this disposed of. Is it?

Mr. Wachtell: I was going to request this, your Honor. In view of the fact that apparently this is for the moment, going to resolve itself into a legal question—

The Court: It is largely a question, a legal question, isn't it?

Mr. Wachtell: —that counsel stipulate that the presence of the grand jury is not required for the time being before the Court.

Mr. Shapiro: I have no objection.

[fol. 30] The Court: Isn't it solely a legal question, as to the application of these statutes?

Mr. Shapiro: We have this mixed question of law and fact. I would appreciate the adjournment, if your Honor please.

Mr. Wachtell: I do not think it requires the grand jury at this time.

The Court: Are you willing to stipulate that for the present at least the grand jury be excused?

Mr. Shapiro: I have no objection.

The Court: Is that satisfactory to you, Mr. Wachtell?

Mr. Wachtell: Quite satisfactory.

The Court: Then the grand jury may be excused.

When will they be asked to return?

Mr. Wachtell: That depends on whether this matter is going forward on Monday or not.

The Court: Would there be other testimony required here? Would there be other questions with reference to this contempt question?

Mr. Wachtell: The Government does not have any other testimony, your Honor.

The Court: In other words, you are submitting this, in effect, upon the basis of the statutes and the questions which have been raised?

Mr. Wachtell: Yes. The Government's position is that the questions, on the face of them, are relevant and material to the investigation. There is no further evidence.

The Court: Is there any other possible testimony from the witness here?

[fol. 31] Mr. Wachtell: Not from the witness, as apparently he has taken the position that he is not going to answer any relevant questions.

Mr. Shapiro: I object to that. I do not think that kind of a statement should be made.

The Court: We will take a recess. Suppose the grand jury comes at two on Monday instead of for the morning hour?

Mr. Shapiro: Two o'clock on Monday.

The Court: Then if we need any further proceedings here, that can be accomplished.

Mr. Wachtell: I do not know what the jury's wishes are. They usually sit mornings.

The Court: Is there any objection to coming Monday afternoon instead of in the morning? If so, speak up.

Apparently not.

A Juror: I will have to be excused.

The Court: That is one.

A Juror: I will have to be excused.

The Court: Two o'clock.

The Foreman: That will be satisfactory.

The Court: Make it two o'clock. The jury may be excused now.

(The grand jury retired.)

The Court: Do you want to mention any other legal matters?

Mr. Wachtell: The Government will just briefly state its position. The witness has been properly subpoenaed before the grand jury, proper and relevant questions have been put to him and he has refused to answer them on the [fol. 32] ground of privilege given by the Fifth Amendment. An applicable, constitutional and completely legal and proper immunity statute gives him immunity coextensive with the protection that the Constitution would otherwise give him. For that reason I think he should be directed to answer the questions.

Mr. Shapiro: If your Honor please, I do not think that

I will refer again to my prior argument on Section 305(d) and Section 47.

I would like to raise some additional matters.

As I started to tell your Honor, back last spring when Mr. Brown was served with a subpoena to appear before another grand jury——

The Court: Where?

Mr. Shapiro: In this building. A special grand jury, I believe it is.

Mr. Wachtell: I believe Mr. Brown, if my recollection is correct, appeared before two different juries. I think his initial appearance was before a regular grand jury.

The Court: What did those matters relate to?

Mr. Wachtell: His first appearance before the grand jury, the regular one, related to the Victor Riesel obstruction of justice case, the case generally in relationship to some of the prospective defendants and the location of a Theodore Rij, who was then a fugitive.

His subsequent appearance before, I think, the March second special March 1956 grand jury, and was a racket grand jury investigating or relating to alleged racketeering in the garment trucking industry.

[fol. 33] The Court: Very well.

Mr. Shapiro: If your Honor please, I did not know there were three grand juries. I assumed that it was all one grand jury. I cannot tell you before which grand jury this occurred, but before one of the grand juries everything was gone into with relationship—to the relationship between the T & R Trucking, Young Tempo, Acme Dress, John Dioguardi, all these matters——

The Court: You mean with this witness Brown?

Mr. Shapiro: With this witness Brown, and a complete investigation made at that time. He is still under that subpoena, which was returnable here on April 19th. He has not been excused from that subpoena.

The Government now starts another grand jury investigation, claiming that it is under the Interstate Commerce Act.

The Court: Excuse me. Do you contend that this waiver of immunity would not apply to the other grand jury investigations; that he might be in difficulty that way?

Mr. Shapiro: I claim, number one, that his immunity might not extend to that grand jury. Number two, that by artful use of this grand jury, the United States Attorney may, by such conduct, abrogate his protection of the Fifth Amendment before the other grand juries, not giving him an immunity to which the Government now says he is entitled to under this section.

There is a very significant statement, if your Honor, please, in these minutes. When Mr. Wachtell was telling [fol. 34] the witness what his immunity was, he said, "Your immunity will be from federal prosecution." So that even here, although *Brown v. Walker* says that the immunity should extend to state prosecutions, the Government had him there ready to testify, but was telling him that he was only entitled to immunity from federal prosecution. So that the area of state prosecution still remains open under this questioning by Mr. Wachtell.

But getting back to this other grand jury, the use of this grand jury in connection with the other proceeding, in my opinion, may be such as to deprive Mr. Brown of his constitutional rights, and even of his right of immunity under this statute by the use of these grand juries by the United States Attorney. He may so question and derive information as to enable him to circumvent the protection or the privilege before the other grand juries.

The Court: What do you mean by that? I don't follow you.

Mr. Shapiro: I state very clearly for the record that before the grand jury—the other grand juries, Mr. Brown has, in the main, as I understand it, claimed his Fifth Amendment.

The Court: And has not testified.

Mr. Shapiro: And has not testified. But Mr. Wachtell—

The Court: He has not refused as to the other grand juries?

Mr. Wachtell: He did testify to some extent, your Honor.

[fol. 35] The Court: Does it go into this area which you seek now in these four or five or six questions?

Mr. Wachtell: His testimony went part way into the area which the present grand jury is investigating. He did

not testify to certain matters which in the present grand jury are relevant to the interstate commerce law violations and will go into.

It is quite possible that a few of the questions that he testified to, that turned into these test questions, a few preliminary questions which would lead to further inquiries before this grand jury, were in fact previously answered by the witness, but the other grand juries were not looking into the violation of any interstate commerce law.

Mr. Shapiro: If your Honor please, I overlooked telling one particular fact about the other grand jury, which I consider very important, and that is that when Mr. Brown came before those grand juries as a witness, at one point he was told by Mr. Wachtell before the grand jury that he was going to be indicted for violation of the internal revenue laws, that the Government is going to obtain an indictment there against him. So that Mr. Brown then turned, at least openly, from a witness to a prospective defendant. He is still in that position. He is still a prospective defendant. He is being compelled here to permit the Government to use this grand jury as a device to get around his proper claim of privilege as to the other grand jury proceedings, to obtain information which may very well result in his indictment, and doing it in such a way as [fol. 36] not to touch upon matters which may be bound up with the internal revenue violations claimed by the Government.

The Court: Is that the feared danger?

Mr. Shapiro: That is the feared danger. It is a very broad danger.

The Court: Involving prosecution?

Mr. Shapiro: That is one of the feared dangers, your Honor. There are others. There were other matters before, but we know that Mr. Wachtell told this witness and business associates of his who were witnesses that they were going to be indicted for violation of the internal revenue laws and we know that that is a clear and present danger as far as these people are concerned, from the Government.

Now the Government comes along and brings another grand jury because they found an immunity statute some-

where, they claim, and they are going to use that as a means of getting around this man's constitutional privilege and getting him to talk to them. I think this is their device and subterfuge. It waters down the immunity and makes it less extensive than the privilege and puts this man in jeopardy.

The Court: Excuse me at this point. Is it your contention that the immunity, even if granted, by this statute, would not be granted to the prosecution under the Internal Revenue Code? Is that your contention?

Mr. Shapiro: It is my contention, your Honor, because this is not a blanket pardon, he has not gotten a pardon from Congress or the President or amnesty. He gets im-[fol. 37] munity only as to those matters concerning which he testified to.

The Court: If it is an immunity it covers any prosecution based upon any of the matters as to which he would not testify, does it not?

Mr. Shapiro: Yes, except in this respect, your Honor. There may be clues and leads developed in this testimony before the grand jury, which in the course of investigation and by the way they are followed and the way they are developed in the other grand jury, that it might not be possible for this man, in case of an internal revenue indictment, to say, "This is based upon testimony before this grand jury."

This is opening the door and enabling the Government to get around his lawful and constitutional claim of the Fifth Amendment in the other grand jury. I am not concerned primarily about the testimony as to the T & R Trucking, but it leaves the door open for them to get clues and leads which may exist as to other things. This is where he has to be protected and this is why I say that this immunity, because of the existence of a prior grand jury investigation and Mr. Wachtell says, "I am going to indict you for violation of the internal revenue laws."

I say that this immunity cannot possibly be as broad as the privilege, and that this is a means adopted by the Government to support that privilege as a device to get around it. It is clever, I must admit. But it is still only

a device, a subterfuge and an artifice, and not proper, in my opinion.

[fol. 38] I would also like to raise one or two other points. There is no proof from the grand jury minutes that this investigation was directed by the Interstate Commerce Commission, that it was directed by the Attorney General. I believe that in this situation the ICC has exclusive jurisdiction. I do not believe that the U. S. Attorney or the grand jury has the right to inquire or initiate this type of investigation on his own. There is no proof of authorization from the Attorney General.

I say further that under Section 46 there is no penalty provided, but we are not up to that point.

There is one other point that I want to refer to, and that is in the Motor Carriers Act itself. I do not recall whether the questions evidenced the fact that Acme Dress is in Midvale. I think there was reference to Midvale, wasn't there, Mr. Wachtell?

Mr. Wachtell: I believe there was, your Honor.

Mr. Shapiro: There was reference to the fact that Young Tempo was in New York?

Mr. Wachtell: Yes.

Mr. Shapiro: Yes.

The Court: New Jersey and New York.

Mr. Shapiro: But as I recall the Motor Carriers Act, there is an exemption where the carriage is between points within a metropolitan district.

Mr. Wachtell: I might state for Mr. Shapiro that Midvale is outside the New York Metropolitan Area.

The Court: Where are the boundaries? How is that determined?

Mr. Wachtell: They extend, encompass some of the area [fol. 39] over in New Jersey. I do not know how available it is.

Mr. Shapiro: Do you have the ICC provisions?

Mr. Wachtell: Your Honor, there is a map which the ICC people put out. I have it right here, your Honor. The Government does not feel it necessary to show in any grand jury investigation that there is a positive showing of the crime, but nonetheless it is quite clear here that Midvale

is outside of the Metropolitan Area, and the Government will show it at this time.

The Court: Mark it in evidence. Let it be part of the record.

Mr. Shapiro: May I see it, please?

The Clerk: Marked Government's Exhibit 1 in re Grand Jury investigation.

(Document handed to Mr. Shapiro.)

The Court: Are we concerned here with any other statutes?

Mr. Shapiro: I beg your pardon?

The Court: Are we concerned here with any other penal statutes?

Mr. Shapiro: As far as jeopardy?

The Court: Yes.

Mr. Shapiro: Well, I think there is a question of conspiracy. There are a number of other statutes which I could refer to, except I do not have their citations right here.

The Court: State statutes?

Mr. Shapiro: State statutes too, your Honor.

Mr. Wachtell: I would like to answer his argument.

[fol. 40] The Court: Go on with your argument.

Mr. Shapiro: Now, I think I have set forth our position.

The Court: Mr. Wachtell will reply to you.

Mr. Wachtell: If your Honor please, basically I do not see that Mr. Shapiro's argument—I do not see just what the witness is complaining about. Mr. Shapiro prefaced his remarks by saying that Mr. Brown had been told that he was a defendant. I think it would be somewhat more accurate to say that he was given the full constitutional warning that he might be indicted by the grand jury. That goes without question. He has not been indicted as yet, and that was several months ago.

The Court: There is not anything out of order there, is there?

Mr. Shapiro: He received the regular warning at the beginning of the session. He was down eleven times, and about the tenth or eleventh time, this was not the usual

warning—"You are going to be indicted for violation of the internal revenue laws." That is not the usual warning.

Mr. Wachtell: I take issue with Mr. Shapiro. He does not have the transcript of the grand jury. I represent to the Court that that is not accurate and nothing was said to him in those words or in substance.

Of course we begin with the basic fact that the witness does not have a right or privilege of any sort not to testify. He merely has a privilege not to incriminate himself. That is being fully taken care of in the instant case. [fol. 41] There is no question about the privilege in the statute being broad as a constitutional protection. So that in any question, that an answer to a question would tend to incriminate him, he is getting an immunity as to anything he may testify to. It goes without saying it is not merely for the ICC laws. It is immunity for the tax laws, the anti-racketeering laws, and if there is anything else that may arise out of the subject matter of this testimony.

I may incidentally point out to the Court that it is not possible for the Court to delineate to what extent that immunity would be. That is a question which would arise, if it ever arises at some future date, where this witness, if he were indicted, if he were indicted for anything, at that time the Court could look back at the testimony given and would, of course, have to determine whether the subject matter of his testimony was such that he obtained immunity. Of course the test there would be coextensive with the test which the Court would initially give to the question as to whether it might tend to incriminate at all. In this connection the courts, of course, have been extremely broad in the interpretation. The Hoffman case in the Supreme Court, as well as the Gordon case by this Circuit, where the privilege was given to the Fifth Amendment, have been extremely broad, and in some cases you might say tenuous. To use the Hoffman language, if it could possibly tend to incriminate, then he is getting full immunity from anything that is the subject matter of his testimony.

[fol. 42] Now with reference to state prosecutions, I think Mr. Shapiro is probably advised of the language in *Brown v. Walker*. That has been held in any number of cases

that it is not necessary for a federal immunity statute to give immunity from state prosecution. And similarly, the possibility of a New York state prosecution does not justify the finding that he will not have to testify in any federal case. This is not a case where by means of federal investigation a state case is being prepared.

I think the most recent case, *Adams v. Maryland*, the Supreme Court, in 1954, stated that it is not necessary for a federal immunity statute to grant immunity from state prosecution.

Of course that would be a question which, should he be indicted by the State, would arise at that time for consideration by the courts.

Mr. Shapiro on the same grounds says that this might tend in some way—and he referred to the fact as to the witness being before other grand juries.

Mr. Shapiro referred to the internal revenue laws. If the questions which are put to the witness here have no conceivable relevancy to the internal revenue laws and could not possibly tend to incriminate him, and are completely separate and apart in every way—and frankly, in modern day life, I do not think it is possible to put a question to a witness which is—but if it would be, of course he would not get immunity. On the other hand, if there is any possible connection with internal revenue laws, any possible [fol. 43] link that might make up the chain, anything that might possibly tend to incriminate him of any violation of the internal revenue laws, or any other statute, he is by virtue of the same testimony, getting full immunity. So he can in no case legitimately incriminate himself. Either the questions are not incriminating and he cannot plead the Fifth Amendment in the first instance, or if they would, in fact, be incriminating, he is receiving immunity. There is no question but what the protection that he is getting here is fully as broad as the constitutional protection to which he is entitled, and that he cannot on that ground refuse to answer.

He has further adverted to the fact that there is no showing that the investigation of the grand jury was authorized by either the Attorney General or the Interstate Commerce Commission. No such showing is required.

There is nothing in the statute which says it must be. The grand jury is an arm of the Court and as such can investigate for any violation of the laws, and that is specifically implemented in Section 322 of Title 49, which provides criminal penalties for violations of the various provisions of the Interstate Commerce laws.

The Court: Very well. Two o'clock on Monday. If you will return here, we will determine what further proceedings are necessary.

Mr. Shapiro: Would it be possible, and does your Honor think it is necessary for us to brief this in any way?

The Court: I do not think so. I think it is largely, a question of statutory interpretation. If you want to send [fol. 44] in this afternoon by four o'clock any citations. I will look at the citations.

Mr. Shapiro: Thank you.

(Adjourned to Monday, April 8, 1957 at 2.00 o'clock p.m.)

Transcript of Proceedings of April 8, 1957

2.00 o'clock p.m.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Is the witness here?

Mr. Shapiro: Yes, your Honor.

The Court: In this matter I have determined that the witness must testify as to the questions which were propounded. I believe that the statutory sections, particularly Section 305(d), Title 49 and Section 46 of Title 49 adequately provide for immunity in the instances involved; I believe that the immunity applies to a grand jury, see *Brown v. Walker*, 161 U. S. 59.

I believe in general that the immunity applies in the State Courts, see *Adams v. Maryland*, 347 U. S. 179.

The immunity exists even though no privilege is claimed, see *U. S. v. Monia*, 317 U. S. 424.

The United States Attorney is charged with enforcement of the United States criminal laws and under the Rules of Criminal Procedure I believe that the witness must

answer. Therefore I direct this witness, Emanuel Brown, [fol. 45] to answer the questions propounded as they were repeated before me on Friday.

Have I covered everything?

Mr. Wachtell: I believe so, your Honor.

The Court: Then, therefore, the grand jury will retire and the question will be propounded and whatever happens will be taken up from there.

Mr. Shapiro: If your Honor please, may I have an adjournment in order to consult with my client?

The Court: I do not think any further—do you want just a few minutes?

Mr. Shapiro: No. I would like to have a day or so to discuss it with him.

Mr. Wachtell: The grand jury is here, your Honor. This is not a new matter. It is one where there was a possibility of a decision by your Honor. It is an open matter.

The Court: Of course.

Mr. Wachtell: I do not see any reason for an adjournment.

The Court: I do not see any reason for that, do you?

Mr. Wachtell: I do not. The Government would be perfectly willing to allow him ten or fifteen minutes.

Mr. Shapiro: Ten or fifteen minutes is not enough.

I respectfully except to your Honor's refusal to a reasonable adjournment.

The Court: I do not think it is necessary, under the circumstances. Obviously you should have been prepared for this situation which now ensues.

[fol. 46] Mr. Shapiro: If your Honor please, I would like to indicate my exception to your Honor's decision, on the record.

The Court: I will allow you a half an hour from now, to a quarter of three.

Mr. Shapiro: I would like to call your Honor's attention to the fact that the Curcio case which involves the question of procedure in this district. It is now before the Supreme Court on certiorari. One of the questions on which, if certiorari is granted, this whole procedure the Supreme Court of the United States is going to decide on this question.

The Court: On what question?

Mr. Shapiro: Namely, the question of whether this type

of hearing which we have had here and the procedure that has been followed here is in accordance with the law and the Constitution.

The Court: I do not know that that makes any difference here in this particular situation. I have ruled, I believe, in accordance with the accepted practice.

Mr. Shapiro: If your Honor please, your Honor has not adverted to the question which I raised as to the other grand juries.

The Court: I do not think the fact that this witness has testified before other grand juries affects this situation. I have considered it. I do not believe that it is pertinent at all here. He is immune from prosecution for all matters on which he is questioned before this grand jury. That covers it.

The grand jury will retire. Counsel may have half an hour. At the prescribed time, 2.45, and he is directed, as [fol. 47] I stated, to answer the questions propounded.

Thank you for coming down.

(At 3.15 o'clock p.m. the grand jury returned to the courtroom.)

Mr. Wachtell: May it please the Court, the April 1957 Regular Grand Jury again wishes to request the aid and assistance of the Court with reference to the witness Emanuel Brown.

May the Government have leave to call the grand jury reporter to advise the jury of the proceedings that have been had since our last appearance here?

The Court: Yes.

Mr. Wachtell: Mr. Louis Benson.

Mr. Shapiro: If your Honor please, may I inquire now as to the nature of this proceeding?

Mr. Wachtell: The Government's understanding of the nature of this proceeding is this: At this point the grand jury is still merely requesting the assistance of the Court. What the Government would request is that if it appears, as will be shown by the testimony of the grand jury reporter, that the witness is persisting in his refusal, the Government will then request of this Court that the Court itself, in the presence of the grand jury, will put the six

questions to the witness and ask him, first, whether he is willing to answer them now, and, second, would he answer them if he were sent back to the grand jury again. And if the witness again refuses here and now in the physical presence of the Court or persists in his refusal to answer, that the witness be held in summary contempt under Rule [fol. 48] 42(a) of the Federal Rules of Criminal procedure.

The Court: That is what I propose.

Mr. Shapiro: If your Honor please, I respectfully except to this procedure and state for the record that this is in lieu of a hearing under Rule 42 and the requirements of due process. I request that he be served or furnished with a notice in open court of the charges, the specifications and afforded an opportunity for a hearing, a full hearing.

The Court: The objection is overruled.

Mr. Shapiro: I respectfully except.

The Court: Swear the witness.

LOUIS BENSON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wachtell:

Q. Mr. Benson, are you a grand jury reporter duly sworn and authorized to take testimony before the grand juries sitting in the Southern District of New York?

A. Yes, sir.

Q. Acting in that capacity, did you take stenographic notes this afternoon of the testimony before the April, 1957, regular grand jury of the witness Emanuel Brown?

A. Yes, sir.

Q. Do you have those notes with you?

A. Yes, sir.

Q. Do they represent to the best of your ability an accurate record of what transpired before the grand jury?

A. Yes, sir.

[fol. 49] Q. Would you read them for the benefit of the Court?

A. (Reading):

"Mr. Wachtell: May the record note that the time is now 2.50 p.m.

"By Mr. Wachtell:

"Q. Mr. Brown, have you consulted with your attorney, Mr. Shapiro, since leaving the court room?

"A. I have spoken to him.

"Q. Now, Mr. Brown, Mr. Shapiro is outside, is that correct?

"A. Yes, sir.

"Q. I am going to put to you the six questions that you have previously declined to answer before this grand jury and that you have been directed to answer by Judge Levett of this court. 'Mr. Brown, are you associated with Young Tempo, Incorporated?'

"A. I refuse to answer on the grounds that I have not had sufficient time to consult with counsel, and I further refuse to answer because by answering I may tend to incriminate myself.

"Q. 'Mr. Brown, does Young Tempo, Incorporated, use a trucking company known as the T & R Cutting Company or as the T & R Trucking Company?'

"A. I refuse to answer because I have not had sufficient time to consult with my counsel, and I further refuse to answer because by answering I may tend to incriminate myself.

"Q. 'Mr. Brown, who do you know to be the owner or owners or the principal in interest or principals in interest of the T & R Cutting or the T & R Trucking Company?'

"A. I refuse to answer because I have not had sufficient time to consult with my counsel, and I further refuse to answer because by answering I may tend to incriminate myself.

[fol. 50] "Q. 'Mr. Brown, are you associated with the Acme Dress Company in Midvale, N. J.?'

"A. I refuse to answer on the grounds that I have not had sufficient time to consult with my counsel, and I further refuse to answer because by answering I may tend to incriminate myself.

"Q. 'Mr. Brown, does the T & R Trucking Company

provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, N. J.?"

"A. I refuse to answer because I have had insufficient time to consult with my counsel, and I further refuse to answer because by answering I may tend to incriminate myself.

"Q. 'Mr. Brown, do you know if the T & R Trucking Company or the T & R Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, N. Y. and Midvale, N. J.?"

"A. I refuse to answer because I have had insufficient time to consult with my counsel, and I further refuse to answer because by answering I may tend to incriminate myself.

"Q. Now, Mr. Brown, do you understand that you were directed to answer these six questions and each of them at this time before this grand jury by Judge Levett of this court?"

"A. May I talk to my lawyer, please?"

"The Foreman: Yes.

"Witness leaves room and returns.

"Q. Mr. Brown, you understand, of course, that you are still under oath?"

"A. Yes, sir.

"(Question, 'Now, Mr. Brown, do you understand that you were directed to answer these six questions and each of them at this time before this grand jury by Judge Levett of this court?' read to witness.)

[fol. 51] "The Witness: I understand, but I must respectfully continue to refuse to answer on the grounds that I presented before.

"Mr. Wachtell: Mr. Foreman, may we have the witness excused temporarily with the direction to remain outside for further instructions?"

"The Foreman: Would you please wait outside?"

"(Witness excused)"

Mr. Wachtell: No further questions.

The Court: You may step down and wait.

Now I take it, Mr. Wachtell, that you wish me to ask the witness these various questions?

Mr. Wachtell: I do, your Honor.

The Court: (To Mr. Brown) Will you take the stand here then.

Mr. Shapiro: I take exception and object to this proceeding.

The Court: Overruled.

Mr. Shapiro: I respectfully except.

If your Honor please, I also base my objection on the ground that the witness is now being asked in a criminal cause to be a witness, and therefore in violation of the Constitution he is being asked to testify against himself, irrespective of the question of privilege or immunity. I submit to your Honor that this man cannot be asked to take the stand and be sworn as a witness or to be compelled to testify.

The Court: Overruled.

Mr. Shapiro: I respectfully except.

The Court: The immunity statute protects him.

Mr. Shapiro: I disagree with your Honor on that.

[fol. 52] The Court: Do you want him sworn again?

Mr. Wachtell: No, I do not think it is necessary.

The Court: He has been sworn, I assume.

Mr. Wachtell: That is correct.

Mr. Shapiro: I object to the characterization of his being sworn. I have not seen him sworn.

The Court: That does not alter the fact.

Mr. Shapiro: This is not the grand jury proceeding, your Honor.

The Court: It is a continuance of the grand jury proceeding, before the Court.

Mr. Shapiro: I respectfully except and I object to this proceeding.

Mr. Wachtell: For the convenience of the Court I have a transcript here of the proceedings of last Friday which would incorporate these questions, the six questions that are now before the Court.

The Court: That is why I asked Mr. Benson to remain.

EMANUEL BROWN, called as a witness, was examined and testified as follows:

By the Court:

Q. I am going to ask you these questions, Mr. Brown. Mr. Brown, are you associated with Young Tempo, Incorporated?

Mr. Shapiro: I object to the question, your Honor.

The Court: Overruled.

Mr. Shapiro: And your Honor putting this question and interrogating this man in a criminal cause.

[fol. 53] The Court: Overruled.

Mr. Shapiro: I except.

A. I refuse to answer the question because by answering I might tend to incriminate myself.

Q. And do you insist upon that and you still refuse to answer?

A. Yes.

Q. Now, Mr. Brown, does Young Tempo, Incorporated, use a trucking company known as the T & R Cutting Company or as the T & R Trucking Company?

Mr. Shapiro: I object, your Honor.

The Court: Overruled.

Mr. Shapiro: I except.

A. I refuse to answer because by answering I may tend to incriminate myself.

Q. You insist upon that still?

A. Yes.

Q. Now, Mr. Brown, who do you know to be the owner or owners or the principal in interest or principals in interest of the T & R Cutting or the T & R Trucking Company?

Mr. Shapiro: If your Honor please, I respectfully object.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I refuse to answer because my answer may tend to incriminate me.

Q. You still insist upon that answer?

A. Yes, sir.

Q. Mr. Brown, are you associated with the Acme Dress Company in Midvale, New Jersey?

Mr. Shapiro: If your Honor please, I object.

The Court: Overruled.

Mr. Shapiro: Exception.

[fol. 54] A. I refuse to answer because by answering I might tend to incriminate myself.

Q. You insist upon not answering, is that correct?

A. Yes, sir.

Q. Mr. Brown, does the T & R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?

Mr. Shapiro: If your Honor please, I object to that.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I still refuse to answer the question. My answer might tend to incriminate me.

Q. You insist upon not answering, is that correct?

A. Yes, sir.

Q. Mr. Brown, do you know if the T & R Trucking Company or the T & R Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey?

Mr. Shapiro: If your Honor please, I respectfully object.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I refuse to answer because by answering I might tend to incriminate myself.

Q. Do you insist upon that answer?

A. Yes, sir.

The Court: I will have to direct him to answer. That is the end of the questions?

[fol. 55] Mr. Wachtell: I believe that is the sixth question.

The Court: Now I direct you to answer all of these questions, Mr. Brown.

Mr. Shapiro: I object, your Honor.

The Court: The first question is, and I shall repeat for your benefit so there will be no misunderstanding whatsoever. I direct you to answer this question:

Are you associated with Young Tempo, Incorporated.

Mr. Shapiro: I object, your Honor, to the direction and the question.

The Court: Overruled.

Mr. Shapiro: I except.

Q. Do you refuse to answer?

A. I do.

Q. I direct you to answer this question, Does Young Tempo, Incorporated, use a trucking company known as the T & R Cutting Company or as the T & R Trucking Company?

Mr. Shapiro: I object, your Honor, to the direction and to the question.

The Court: Overruled.

Q. Do you refuse to answer?

A. I refuse to answer.

Q. In each case upon the grounds previously stated by you?

A. Yes, sir.

Q. The next question I direct you to answer is this: Who do you know to be the owner or owners of the principal in interest or principals in interest of the T & R Cutting or the T & R Trucking Company?

[fol. 56] Mr. Shapiro: I object, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I refuse to answer because it might tend to incriminate me.

Q. I direct you to answer this question: Are you associated with the Acme Dress Company in Midvale, New Jersey?

Mr. Shapiro: I object, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I refuse to answer.

Q. I direct you to answer this question: Does the T & R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?

Mr. Shapiro: I object, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I refuse to answer for the previous reasons.

Q. Do you know, Mr. Brown, and I direct you to answer this question: Do you know if the T & R Trucking (sic) Company or the T & R Trucking Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, N. Y. and Midvale, New Jersey?

Mr. Shapiro: I object, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

[fol. 57] A. I refuse to answer on the same ground.

The Court: That was the sixth question.

Mr. Wachtell: The Government's other request, your Honor, would be that the witness be asked whether he would maintain his refusal to answer if he returned to the grand jury room.

Q. You have declined to answer these questions here before me in this courtroom and before this grand jury which is here. Do I understand that you will maintain that position and that you will not answer if you are returned to the grand jury room, to answer these questions?

Mr. Shapiro: I object, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

A. Yes, sir.

Q. And do you believe that these answers will incriminate you?

Mr. Shapiro: I object to that question, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

Q. Do you believe that the answers to these questions just asked you would incriminate you in any way?

Mr. Shapiro: I object to that as wholly improper, your Honor, a violation of his privilege.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I refuse to answer.

[fol. 58] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Very well. By reason of your refusal to answer in the actual presence of this Court, I am forced to act upon this matter.

Mr. Wachtell: The Government rises, if your Honor pleases, solely for the purpose that if your Honor is going to hold the witness in contempt, the Government would want to be heard on the question of sentence, before sentence is imposed.

The Court: I shall hear you.

Mr. Wachtell: At this time?

The Court: At this time.

Mr. Shapiro: If your Honor please, I object again to this whole proceeding and ask again for a notice and specifications and an opportunity to be heard.

The Court: Overruled.

Mr. Shapiro: Exception.

Mr. Wachtell: The Clerk points out, your Honor, that as yet there is no judgment. Perhaps the procedure would be best that if you intend to hold the witness in contempt—

The Court: I will listen to any motion you may wish to make with reference to contempt and the sentence of punishment, and I will listen to counsel now, if you have nothing to say first as to any reason why I should not hold this witness in contempt.

Mr. Wachtell: I have nothing to add on the question of the judgment as to contempt.

The Court: Do you wish to say anything?

Mr. Shapiro: Yes, your Honor.

The Court: Very well.

[fol. 59] Mr. Shapiro: If your Honor please, in opposition to a finding of contempt I urge, first that your Honor has misapprehended the provisions of Section 305(d) and Section 46 of Interstate Commerce Act, and by virtue of those sections no immunity is obtained by this witness in testifying before the grand jury. Even if there were some semblance of immunity, it is not coextensive with the full constitutional privilege and it is not such as to warrant any compulsion upon him to testify.

I reiterate the question of the other grand jury proceeding pending in this court I again urge the Court to enable us to have a full hearing on the issues of fact involved here as to the other grand jury proceedings and to require the grand jury stenographers to produce here the minutes of those proceedings so that the Court may see what the inquiries were in that proceeding and see the possible jeopardy, the potential jeopardy, to which this respondent is subjected.

I object to this whole procedure on the ground that irrespective of the question of immunity, Mr. Brown's constitutional rights in a criminal cause have been seriously infringed, both in respect to being compelled to take the stand and being sworn and being asked questions.

Further, in being asked in a proceeding entirely separate from the grand jury proceeding as to whether he believes certain things to be true as to whether he believes that answering these questions would incriminate him, and I say [fol. 60] to your Honor that it is a violation of his privilege against self-incrimination and no possible touching upon that has happened in the grand jury proceeding, and therefore such a question is barred by the privilege against self-incrimination.

I say that the failure to give us notice and an opportunity to defend, since the witness has been in jeopardy throughout this proceeding, is violative of due process and all of Mr. Brown's rights under the Constitution.

I say that the United States Attorney is merely using this proceeding as a device or subterfuge artifice to get

around this man's constitutional rights. I respectfully state to the Court that no finding of contempt should be made here. The claim of self-incrimination is made in good faith and is based upon actual situations, and therefore again ask the Court not to find him in contempt.

The Court: Do you want to reply?

Mr. Wachtell: The Government has no reply. The Government's position has been indicated.

ADJUDICATION OF CONTEMPT

The Court: Very well.

I hereby adjudicate this witness in contempt. I will listen to the Government in so far as punishment is concerned.

Mr. Wachtell: On the question of sentence, your Honor, the inquiry in this case is, of course, a separate grand jury investigation. None the less, as counsel for Mr. Brown has indicated frequently here, the subject matter to some extent and the witness Mr. Brown himself have been before other grand juries investigating, as I believe I stated to your Honor, on Friday, the Victor Reisel obstruction of [fol. 61] justice case as well as the general racket investigation being conducted for the past year in this district.

It is the Government's information, as the questions attempted to bring out in this case, that the witness, Mr. Brown, has been associated in certain respects with certain persons who are the subject of these investigations, the present one included as to an interstate commerce investigation, these persons being John Dioguardi and Theodore Ray, as well as possibly others.

The information that it is desired to elicit from this witness, I represent to the Court, is of the very greatest importance, and the witness' refusal to answer is a very great stumbling block to this investigation and to all these investigations.

The reason that I refer now to the prior investigations is that the Government believes that the witness by obstinately refusing to answer here, despite the fact that he would be getting full immunity is clearly evinced by the fact that his former pleas as to the Fifth Amendment as a witness before the former grand juries were not ad-

vanced in good faith, were not advanced because of any real fear of self-incrimination, but rather were used as a shield upon which the witness could refuse to perform his duties as a citizen and as a sworn witness, namely, to give truthful and honest testimony as to facts within his knowledge.

For these reasons, your Honor, although the Government never makes specific recommendations as to sentence in any criminal matter, as your Honor knows, the Government [fol. 62] here would ask for a substantial sentence, and that is done not so much for any punitive effect as it would be for the coercive effect of the sentence.

Under the statute there is no maximum penalty upon the sentence that your Honor may impose. The only maximum is that imposed by the Constitution against cruel and unusual punishment.

I would further ask your Honor specifically that in imposing sentence here your Honor not include a purge clause. And the reason that I make that request is as follows:

As the law is at present, should a purge clause be included in your Honor's sentence, this witness could not be imprisoned, as I understand the law, once this grand jury properly should be no longer in session. That has been stated in various cases, including the Loubriel case in this circuit, as well as the Yates case in the Ninth Circuit.

The same practical effect of the purge clause can be gathered by a straight sentence. And the reason I say that is this:

Should the defendant at any future time desire to come forward and give the testimony that is required of him, your Honor, under the provisions of Rule 35 of the Federal Rules of Criminal Procedure, could within 60 days from the termination of all proceedings in this matter, whether that be proceedings here or whether there should be an appeal or from the ultimate disposition of any appeal, within 60 days your Honor could take into consideration all of the facts and effectually purge the sentence by reducing it.

[fol. 63] Furthermore, should there be a purge clause, the witness would be in a position to hamstring this grand jury indefinitely. For instance, should he appeal and should

the matter take some time in the courts he could at the end of the appeal, should the appeal be adverse, could come forward and answer these six questions precisely and then begin all over again as to any further questions.

Should you impose a straight sentence, your Honor would be able to take all the questions into account as to the question as to whether there is genuine merit.

Mr. Shapiro: If your Honor please, I am surprised at the U. S. Attorney's position here. He is not asking you to punish Mr. Brown for whatever may have gone on before this grand jury. He is asking you to punish him for using his privilege against self-incrimination in another grand jury investigation. He is trying to impose a penalty upon a man because he rightfully, undoubtedly rightfully, invoked his Fifth Amendment privilege in the other grand jury proceeding.

The Court: I am not concerned with that. I do not think that is his contention.

Mr. Shapiro: That is what he said, your Honor.

The Court: I do not interpret it that way. Is that all you wish to say?

Mr. Shapiro: Yes, your Honor, except that I reiterate my legal position as I have stated before here.

The Court: I am forced to disagree with that.

(To the witness) You may step down.

(Witness excused.)

[fol. 64]

SENTENCE

The Court: My adjudication is that he be confined for a period of one year and three months.

REQUEST FOR BAIL AND DENIAL THEREOF

Mr. Shapiro: If your Honor please, may we have the respondent released on bail pending appeal? There are serious questions of law involved in this case. As a matter of fact, one of the most serious questions is now before the Supreme Court of the United States on certiorari, and this man should have bail on that basis alone.

There are other serious questions involved, such as whether there is any actual immunity, and therefore I respectfully submit to your Honor that this man should be released on bail pending the disposition of this appeal.

Mr. Wachtell: The Government's position on that is as follows:

Under the rules, of course, bail cannot be granted should the appeal be deemed frivolous.

Basically Mr. Shapiro has raised two questions. One is the question of procedure that has been followed here and the other is the substantive question of immunity. The question of procedure is one that is before the Supreme Court only tangentially and is one that has been specifically and recently reaffirmed by this circuit in the Curcio case and has been followed, as previously pointed out, in other cases in this and in other circuits.

The substantive question the Government feels is clear, and I am not going to reiterate all the arguments that I have made previously. However, even if the Court deems this appeal not to be frivolous, the Court nevertheless retains discretion to deny bail pending appeal. And the [fol. 65] Government feels specifically as to the standards that are set forth under Rule 46 that it appears that the appeal has been taken for the purpose of delay. I believe that language is there. Specifically in a case such as this, where a grand jury proceeding has been put at a standstill, and where apparently, and I say this from the repeated requests that have been made here for adjournment, although no rational basis for any adjournment would appear, it would appear that the design of the witness is to gain delay and gain time and hold up this grand jury investigation of inquiry.

For that reason, even if your Honor feels that the appeal is not frivolous, the Government would ask that the application for bail pending appeal be denied. Counsel can, of course, always apply to the Court of Appeals.

I would also point out, in passing, that there has to be an order and a certificate—

The Court: I direct you to prepare the order and submit it to me.

Mr. Wachtell: The Government will, your Honor.

Mr. Shapiro: If your Honor please, the issue of procedure is not in the Curcio appeal tangentially. It is a direct question presented to the Supreme Court of the United States on a petition for writ of certiorari. It is one of the questions which is being briefed now and will be argued before the Supreme Court of the United States. Where the Supreme Court has granted certiorari, I do not see how anybody can argue that such an appeal is frivolous. Actually there is merit to it because the Supreme Court has said, "We are going to hear arguments about it."
[fol. 66] Mr. Wachtell relies on the Curcio case, and that is the very case that the Supreme Court is granting certiorari on.

This man is a family man. He has a child and a wife. He is a business man and there is no fear at all that this man is going to leave the jurisdiction and not be available for whatever may happen on his appeal.

The questions raised here are substantial, and there is no interest in delay.

The Court: Irrespective of whether the questions are substantial or not, under the circumstances and at the discretion of this Court I will deny bail.

Mr. Shapiro: I respectfully except to your Honor's ruling.

May we have until tomorrow at 4 o'clock to surrender, your Honor? After all he has a family and he has a business to make arrangements about.

The Court: Any objection?

Mr. Shapiro: Another day is not going to delay this much longer, is it, your Honor?

Mr. Wachtell: No objection.

The Government will prepare the order and the certificate in the meantime.

The Court: Yes. It is granted.

Mr. Wachtell: 4.00 p.m.

The Court: 4.00 p.m. tomorrow.

[fol. 67]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 388—October Term, 1956.

(Argued May 6-7, 1957.)

Docket No. 24626

UNITED STATES OF AMERICA, Appellee,

v.

EMANUEL BROWN, Defendant-Appellant.

OPINION—July 10, 1957

Before: Medina, Hincks and Lumbard, Circuit Judges.

Emanuel Brown appeals from a sentence of 15 months imprisonment for contempt of court in refusing to answer questions propounded to him before a grand jury in the Southern District of New York in an investigation under the Motor Carrier Act, 49 U. S. C. A. §§301-327. The District Court ordered him to answer, ruling that thereby he received immunity from prosecution under 49 U. S. C. A. §305(d) and §46. Richard Levet, Judge. Affirmed.

[fol. 68] Paul W. Williams, United States Attorney, Southern District of New York, New York, N. Y. (Herbert M. Wachtell, Assistant United States Attorney, of counsel), for appellee.

Myron L. Shapiro, New York, N. Y., for defendant-appellant.

LUMBARD, Circuit Judge:

Emanuel Brown appeals from a judgment of conviction and a sentence of 15 months imprisonment for refusing to answer questions before a grand jury which was investigating alleged violations of the Motor Carrier Act, 49 U. S. C. A. §§301-327 despite assurances that under the applicable provisions of law, 49 U. S. C. A. §§305(d), 46, he would be immune from prosecution regarding any matters concerning which he would be required to testify.

As Brown questions the propriety of the procedure resulting in the judgment, as well as the existence and extent of the immunity conferred and the severity of the sentence imposed, we first consider the sequence of events before the grand jury and the court.

On Friday, April 5, 1957, Brown was called before a grand jury which he attended pursuant to the command of a subpoena. This grand jury was conducting an investigation into an alleged violation of the Motor Carrier Act. Although advised by the Assistant United States Attorney that he could not be prosecuted on account of any matter concerning which he would testify under the Motor Carrier Act, Brown refused to answer these six questions:

"Q. Mr. Brown, are you associated with Young Tempo, Incorporated?

[fol. 69] Q. Mr. Brown, does Young Tempo, Incorporated, use a trucking company known as the T and R Cutting Company or as the T and R Trucking Company?

Q. Mr. Brown, who do you know to be the owner or owners or the principal in interest or principals in interest of the T and R Cutting or the T and R Trucking Company?

Q. Mr. Brown are you associated with the Acme Dress Company in Midvale, New Jersey?

Q. Mr. Brown, does the T and R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?

Q. Mr. Brown, do you know if the T and R Trucking Company or the T and R Cutting Company has ap-

plied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey?"

Thereupon the grand jury attended before Judge Levet to seek his aid and assistance in a direction to Brown, who was present with his counsel, that he answer the questions. At the suggestion of the government the courtroom was cleared of all but the interested parties and court personnel, no objection being then made to this procedure.

At this first hearing, government counsel stated that Brown's testimony was sought because Young Tempo, Inc., a New York City dress manufacturing firm in which Brown was a principal, had used the T and R Trucking Company or the T and R Cutting Company for trucking. The government stated that its inquiry was directed to the true ownership of these trucking companies and their operation between New York and New Jersey, contrary to law, without a permit from the Interstate Commerce Commission.

[fol. 70] Although Brown's counsel had been advised eleven days before, on March 25, that Brown was to be questioned on these matters under the Motor Carrier Act, he asked for a "reasonable adjournment" and notice of the specifications or charges in order to prepare for the hearing.

When the judge asked counsel what proof he might wish to present, counsel replied that he would like to look into the question of whether he could compel production of the minutes of prior grand jury investigations in which Brown had pleaded the Fifth Amendment.¹

Brown's counsel asserted the investigation was being used "as a means of circumventing the exercise by Brown of his Fifth Amendment privilege to refuse to testify before the other grand jury," which government counsel denied.² There followed a colloquy regarding the existence

¹ These investigations related to the Victor Reisel acid blinding case, and to racketeering in the garment trucking industry.

² Brown's counsel also stated that the Assistant United States Attorney had threatened Brown with indictment under the revenue laws. There is nothing in the record to substantiate this statement.

and scope of the immunity available to a grand jury witness under 49 U. S. C. A. §305(d) and §46, which we treat as the principal questions before us.

The grand jury reporter was then called as a witness and testified that Brown refused before the grand jury to answer each of the six questions on the ground that by answering he might tend to incriminate himself. A recess was taken until Monday afternoon, April 8.

On Monday, Brown and his counsel again appeared before Judge Levet. After the judge had indicated that he would instruct Brown to answer because the statute gave him full immunity, Brown's counsel asked for an adjournment of a day or so for further discussion with his client. The judge refused to allow more than half an hour and directed that the questions be answered before the grand [fol. 71] jury at 2:45 P. M. After Brown's reappearance the grand jury returned to the courtroom at 3:15 P. M. and reported Brown's continued refusal to answer. The government then asked that the court again put the questions to Brown and suggested that Brown's persistent refusal in the physical presence of the court would justify his being summarily held in contempt under Rule 42(a) of the Federal Rules of Criminal Procedure.

Brown, who had already been sworn before the grand jury, was called to the stand by the district judge. His counsel objected to this procedure, apparently on the ground that Brown was now a defendant in a criminal contempt case, but this was overruled. The questions were again put by the court and Brown refused to answer each question on the ground that it might tend to incriminate him. After Brown's counsel again repeated his arguments why Brown should not be compelled to answer, the Court adjudged Brown to be in contempt, under 18 U. S. C. A. §401, and sentenced him to be confined for one year and three months.

1. Immunity under the Motor Carrier Act.

We start with the general proposition that where Congress has granted immunity from prosecution coextensive with the protection of the Fifth Amendment, the witness

may not refuse to testify on the claim that he may incriminate himself. *Brown v. Walker*, 161 U. S. 591 (1896) decided that with respect to the same §46 here in question, then 27 Stat. 448, Act of February 11, 1893. *Ullman v. United States*, 350 U. S. 422 (1956) is the latest affirmation of this principle with respect to the Immunity Act of 1954.

Brown claims, however, that Congress did not intend to make the immunity provisions of §46 of the Interstate Commerce Act apply to grand jury investigations of all [fol. 72] leged offenses under the Motor Carrier Act. We do not agree. We find that a reading of the applicable sections of the Interstate Commerce Act shows that Congress intended that witnesses testifying in a grand jury inquiry under those sections having to do with motor carriers would receive immunity just as if they were testifying in a grand jury inquiry under Title I.

The second clause of 49 U. S. C. A. §305(d) affords immunity in grand jury proceedings under the Motor Carrier provisions, Chapter 8, by incorporating, the "rights, privileges and immunities" and "the duties, liabilities, and penalties" of witnesses as stated in §46 of Title I.

Section 305(d)³ in its pertinent words provides:

" * * * and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, * * * "

³ Section 305(d) reads: "So far as may be necessary for the purposes of this chapter, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpoena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title; and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, unless otherwise provided in this chapter."

Section 46⁴ provides in part:

"No person shall be excused from attending and testifying * * * in any cause or proceeding, criminal, or other [fol. 73] wise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify * * * in any such case or proceeding; * * *"

It seems to us that the natural meaning of the reference in §305(d) to §46 is that whatever is within the scope of the latter is to be incorporated into the former. Hence the immunity applies to grand jury investigations under Chap-

⁴The full text of §46 is: "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding; Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than \$100 nor more than \$5,000, or by imprisonment for not more than one year or by both such fine and imprisonment."

ter 8, the Motor Carrier Act, just as it does to such investigations under Chapter 1.

Brown's argument is that since the first clause of §305(d) grants investigatory power only to the Commission, for [fol. 74] "any matter under investigation," the reference in the immunity clause of §305(d) to "any matter under investigation under this chapter" should be read *in pari materia* with the empowering clause to mean "under investigation under this chapter *by the Commission*." Consequently, §305(d) is limited to hearings before the Commission and does not apply to matters before grand juries and courts. We do not agree. It seems clear that if §46 applies at all it applies equally to "any cause or proceeding, criminal or otherwise." There is no qualifying language. On the contrary, §305(d) in plain words has made the immunity applicable to "*any* matter under investigation under this chapter." [Emphasis added.] This is not limited to any matter under investigation before the Commission. Furthermore, Chapter 8 provides in §322 for criminal prosecutions and penalties for the enforcement of its various provisions, 49 U. S. C. A. §§301-327. Thus the power to compel testimony is as natural to and as much wedded to Chapter 8 as it is to Chapter 1. Moreover, we are unable to see anything peculiar to motor carrier investigations which would justify a construction of the immunity provision narrower than that applicable to investigations relating to the other forms of transportation under the Interstate Commerce Act.

The language is clear, the construction for which the government contends is practical and sensible, and there is no reason why we should not construe the language according to its plain meaning.⁵ *United States v. Missouri Pacific R. R. Co.*, 278 U. S. 269, 278 (1929).

⁵ Congress has made grants of immunity applicable to grand jury proceedings under numerous statutes both before and after enactment of the Motor Carrier Act in 1935, among others: (1893) Interstate Commerce Act, now 49 U. S. C. A. §46; (1903) Anti-Trust Laws, 15 U. S. C. A. §32; (1916) Shipping Act, 46 U. S. C. A. §827; (1919) National Prohibition Act, 41 Stat. 317; (1933) Securities Act of 1933, 15 U. S. C. A. §77v(c); (1934) Securities and Exchange Act, 15 U. S. C. A. §78u(d); (1934)

[fol. 75] Brown's second argument is that even if §305(d) incorporates the immunity granted by §46, this is inadequate protection. He claims that it does not provide immunity for offenses not related to violations of the Motor Carrier Act because the immunity under §305(d) can be granted only "so far as may be necessary for the purposes of this chapter."

We do not believe the immunity is so limited. The statutory language does not imply that immunity is to be limited to offenses under the Motor Carrier Act; immunity for an offense under the revenue laws may be equally necessary "for the purposes of this chapter," precisely for the reasons suggested in this case. The scope of immunity must be as broad as the scope of incrimination, see *Counselman v. Hitchcock*, 142 U. S. 547 (1892), and we see no reason to think that any court will construe it more narrowly. Thus where Congress has said that the witness "shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, * * *" Congress has said that the witness cannot and will not incriminate himself by answering questions. This covers, and is meant to cover, everything which may be testified to, "any transaction, matter or thing." *United States v. Andolschek*, 142 F. 2d 503, 506 (2 Cir. 1944).

Should proceedings ever be brought against Brown regarding any transaction, matter or thing concerning which he testifies, he has a complete defense at that time. The

Federal Communications Act, 47 U. S. C. A. §409(e); (1935) Industrial Alcohol Act, 26 U. S. C. A. §5315; (1935) Internal Revenue Act, 49 Stat. 875, now §5315, Internal Revenue Code of 1954, 26 U. S. C. A. §5315; (1935) Federal Power Act, 16 U. S. C. A. §825f(g); (1935) Public Utility Holding Company Act, 15 U. S. C. A. §79r(e); (1937) Bituminous Coal Act, §8(b), 50 Stat. §87; (1938) Civil Aeronautics Act, 49 U. S. C. A. §644(i); (1938) Natural Gas Act, 15 U. S. C. A. §717m(h); (1940) Investment Advisors Act, 15 U. S. C. A. §80b-9(d); (1940) Investment Companies Act, 15 U. S. C. A. §80a-41(d); (1940) Water Carriers Act, 49 U. S. C. A. §916(a); (1942) Second War Powers Act, 50 U. S. C. A. App. §643(a); (1942) Freight Forwarders Act, 49 U. S. C. A. §1017(a); (1954) Immunity Act of 1954, 18 U. S. C. A. §3486(e); and (1956) Narcotics Control Act, 18 U. S. C. A. §1406.

immunity attaches with the testimony. *United States v. Monia*, 317 U. S. 424 (1943); *United States v. Andolschek*, *supra*. Even though the witness is already under indictment he must testify as he thereby is put beyond the reach of further prosecution. That much was decided by Judge Learned Hand in 1910 in *In re Kittle*, 180 Fed. 946, and this principle has never been questioned in any reported case. From this it follows that Brown has no right to remain silent because of some fancied prosecution which may never happen. It is enough for him to know that he is fully protected. The government has been empowered by Congress to pay the price of immunity for Brown's testimony. Should the need ever arise the courts will see to it that the bargain is fully kept.

Thus it follows that what may have happened when Brown testified before other grand juries is irrelevant in the light of the fact that he would receive immunity when he testified in the investigation under the Motor Carrier Act, and the district judge correctly refused to consider what Brown may have testified to previously or what may have transpired before those grand juries.

2. *The Validity of the Procedure.*

Brown further complains that in the District Court proceedings he was deprived of his rights to notice and a hearing under Rule 42(b) of the Federal Rules of Criminal Procedure, and that the fundamental safeguards due him in a criminal proceeding were not accorded. We disagree. [fol. 77] In cases where the witness is instructed by the Court and he refuses in the presence of the Court to comply with its order, we look to subsection (a) of Rule 42 which reads:

"(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

The Court having properly ruled that Brown must answer the questions, it was in order for the Court to require Brown to return to the grand jury and answer. When Brown persisted in his refusal to answer and repeated that refusal before the Court, Brown had disobeyed a lawful order of the Court, 18 U. S. C. A. §401(3) and as his disobedience and contempt of the Court's order had taken place in the "actual presence" of the Court, the judge was empowered under Rule 42(a) forthwith and summarily to punish Brown.

Brown and his counsel were afforded every reasonable opportunity to be heard regarding Brown's claim of privilege and the Court's proposed action thereon. While the issue had some novel aspects under the Interstate Commerce Act, counsel was advised of them well in advance of the first hearing on April 5 when the questions were first put to Brown. At that time and thereafter on April 8 the judge afforded Brown and his counsel full opportunity to be heard. The procedure here followed is almost identical with that which was before us in *United States v. Gordon*, 236 F. 2d 916 (1956); *United States v. Courtney*, 236 F. 2d 921 (1956); *United States v. Curcio*, 234 F. 2d 470 (1956), reversed by the Supreme Court on other grounds, June 10, 1957; *United States v. Trock*, 232 F. 2d 839 (1956), reversed [fol. 78] on other grounds 351 U. S. 976 (1956). See also *Carlson v. United States*, 209 F. 2d 209 (1 Cir. 1954).

The procedure which was followed here fully accorded to Brown all his rights under §42(a): he was given ample notice, he was represented by counsel and his counsel was fully heard.

There is good reason for providing for such summary procedure and for applying it to contumacious grand jury witnesses. The public interest requires that grand juries should suffer a minimum of delay in their investigations. Each delay of such an inquiry, however brief, multiplies the difficulties in getting facts, locating witnesses and finding the truth. Law enforcement faces enough difficulties without the added hazard of the unnecessary delays due to protracted hearings and adjournments which are not necessary. The district judge acted promptly and with commendable diligence. At the same time he afforded Brown

and his counsel a full and adequate hearing at which all the points raised in this court, save one, were discussed.

The one point which was not raised below was the secrecy of the proceedings. Not having objected to the clearing of the courtroom at the time, we do not see how Brown can be heard to complain now. So long as the witness' counsel was there to represent him and to make protest Brown has no standing to complain now. *In re Oliver*, 333 U. S. 257 (1948), is not in point as there the state judge, who was himself the one-man grand jury, forthwith convicted the petitioner in a secret session without any advance notice and without allowing him any time to consult counsel.

Finally, Brown's contention that he was entitled to the right of a criminal defendant to refuse to answer any questions before the district judge is rejected. In the first place, this hearing before the district judge was, despite Brown's argument to the contrary, merely a proceeding ancillary to the grand jury investigation and not a criminal [fol. 79] proceeding. In the second place, preventing the Court from inquiring of the witness whether he is willing to answer questions would frustrate the proper operations of the grand jury, and without affording the witness any protection which is not already accorded him. The Court is merely being advised as to what had already happened before the grand jury. Brown had already made it clear, both to the grand jury and the Court that he refused to answer. Had Brown remained mute and refused to speak at all, the result would have been the same.

Brown further complains that a sentence of 15 months constitutes cruel and unusual punishment in violation of the Eighth Amendment, or, in any event, an abuse of the Court's discretion. We find no merit to either of these contentions.

There is no statutory maximum which governs the power of the district court judges to sentence for contempts committed in their presence. Therefore unless the punishment offends the prohibition of the Eighth Amendment by reason of its cruel and unusual nature we must affirm the sentence imposed. For failure to produce books subpoenaed by a grand jury it has been held that 18 months imprisonment is not excessive. *Lopiparo v. United States*, 216 F. 2d 87, 92

(8 Cir. 1954), cert. denied 348 U. S. 916 (1955). We have heretofore sustained sentences up to three and four years where defendants have violated court orders to surrender, *United States v. Thompson*, 214 F. 2d 545 (2 Cir. 1954), cert. denied 348 U. S. 841 (1954); *United States v. Hall*, 198 F. 2d 726 (2 Cir. 1952), cert. denied 345 U. S. 905 (1953); and *United States v. Green*, 241 F. 2d 631 (2 Cir. 1957), cert. granted May , 1957.

That it has long been understood that the district courts have a considerable latitude in contempt sentences is further borne out by such cases as *Warring v. Huff*, 122 F. 2d 641 (D. C. Cir.), cert. denied 314 U. S. 678 (1941), two [fol. 80] consecutive sentences of 13 months; *Conley v. United States*, 59 F. 2d 929 (8 Cir. 1932), two years; and *Hill v. United States*, 300 U. S. 105 (1937), concurrent sentences of a year and a day and two years. In view of these precedents it cannot be said that there was anything cruel or unusual about the sentence of 15 months which was imposed here.

Nor was the district court obliged to provide that the contemnor might purge himself. The judge fully considered whether he should so sentence Brown, and for good and sufficient reasons the sentence was unconditional. Indeed, we are not advised that Brown desires to purge himself.

There is no point in inquiring into whether the district judge meant the sentence to be coercive or punitive. The sentence was well within the power of the district court and that is the only question into which we may inquire.

The judgment is affirmed.

[fol. 81]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

EMANUEL BROWN, Defendant-Appellant.

JUDGMENT—July 10, 1957

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 83] Clerk's certificate to foregoing transcript (omitted in printing).

[fol. 84] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—April 7, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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AUG 8 1957

JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~1003~~ 14

EMANUEL BROWN,

Petitioner,

against

UNITED STATES OF AMERICA.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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Dated August 5, 1957

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Supreme Court of the United States

OCTOBER TERM, 1957.

No.

EMANUEL BROWN,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Emanuel Brown, respectfully prays that this Court issue its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York convicting petitioner of criminal contempt by reason of petitioner's refusal to answer questions put to him by the Court in the presence of the grand jury. The sentence imposed was fifteen months. Petitioner was enlarged on bail, of \$5,000, pending appeal. The Court of Appeals has granted a stay of its mandate pending final disposition in this Court.

Opinion Below

The opinion of the Court below, per Lumbard, C. J., has not been officially reported and is printed *infra* at page 53.

The District Court's opinion on the question of law is not officially printed, but appears *infra* at page 10.

Jurisdiction

The judgment of the Court below was dated and entered on July 10, 1957.

Jurisdiction to review such judgment by the writ prayed for is conferred on this Court by Section 1254, Title 28, U.S.C. and is invoked pursuant thereto and Rule 37(b) of the Federal Rules of Criminal Procedure.

Questions Presented for Review

1. Whether in a grand jury investigation of alleged offenses under §322 (*infra*, p. 43) of the Motor Carriers Act (Title 49, U.S.C.), a witness before that body obtains, pursuant to §305(d) (*infra*, p. 35) of that Act, immunity from prosecution for any transaction or offense concerning which he may under compulsion testify or produce evidence.

a. Whether Congress in enacting §305(d) (*infra*, p. 35) of the Motor Carriers Act, *supra*, intended to make the immunity provisions of §46 (*infra*, p. 35) of the Interstate Commerce Act (Title 49, U.S.C.) applicable to grand jury investigations under the Motor Carriers Act.

b. Whether, assuming *arguendo*, that some immunity was conferred upon petitioner by §305(d) of the Motor Carriers Act, it is co-extensive with his privilege against self-incrimination and, therefore, constitutionally sufficient to eliminate his privilege against self-incrimination.

2. Whether the procedure followed herein which resulted in petitioner's conviction of criminal contempt, pursuant to subdivision (a) (*infra*, p. 39) of Rule 42 of

the Federal Rules of Criminal Procedure, for refusing in the presence of the Court and the grand jury to answer certain questions previously put to him before the grand jury, was valid and proper.

a. Whether petitioner, after he had been directed by the District Court to answer before the grand jury certain questions put to him and had re-appeared before the grand jury and refused once more to answer the questions, was entitled, under subdivision (b) of Rule 42, Federal Rules of Criminal Procedure (*infra*, p. 39), the requirements of Due Process and the fundamental fairness requisite in Federal criminal proceedings, to notice, reasonable time for preparation and a statement of the criminal contempt charged.

(b) Whether, after petitioner returned to the grand jury pursuant to the order of the District Court, but refused again to answer the questions directed by that Court to be answered and was once more brought before the Court, the District Court could validly ignore Rule 42(b) of the Federal Rules of Criminal Procedure and refuse to afford petitioner notice, specification of charges, and reasonable time for preparation and compel petitioner to take the stand and testify and, upon petitioner's refusal to answer and his statement that he would refuse again to answer, if returned to the grand jury, convict petitioner of criminal contempt pursuant to Rule 42(a) as for a contempt committed in the presence of the Court.

(c) Whether the secrecy of the proceedings violated the requirement that a contempt judgment be public.

3. Whether the sentence of fifteen months imposed upon petitioner constituted cruel and unusual punishment or, an abuse of the District Court's discretion.

a) Whether in this criminal contempt proceeding the District Court had power to impose a sentence of more than one year.

b) Whether in this criminal contempt proceeding the District Court could impose a coercive sentence.

Constitutional Provisions, Statutes and Regulations Involved

The pertinent text of the constitutional provisions, statutes and regulations, being lengthy, are set forth as an appendix to this petition, *infra*, p. 35, *et seq.* Their citations follow:

United States Constitution, Amendments V, VI, VIII; *Motor Carriers Act*, Title 49, U.S.C., §§305(d), 322; *Interstate Commerce Act*, Title 49, U.S.C. §46; *Atomic Energy Act*, Title 42, U.S.C., §2201; *China Trade Act*, Title 15, U.S.C., §155(a), (c); *Civil Aeronautics Act*, Title 49, U.S.C., §644(i); *Code of Criminal Procedure*, Title 18, U.S.C., §§401, 1406, 3481, 3486; *Commodity Exchanges Act*, Title 7, U.S.C., §15; *Federal Trade Commission Act*, Title 15, U.S.C., §49; *Securities Act of 1933*, Title 15, U.S.C., §77(v), (c); *Merchant Marine Act*, 1936, Title 46, U.S.C., §1124(c); *Perishable Commodities Act*, Title 7, U.S.C., §499 m (f); *Taft-Hartley Act*, Title 29, U.S.C., §161 (3); *Social Security Act*, Title 42, U.S.C., §405(d), (f); *Rent Control Act*, Title 50, App., U.S.C., §1896; *Emergency Price Control Act*; 50 Stat. 30 (1942), §202(g); *Federal Communications Act*, Title 47, U.S.C. §409 (1); *Federal Deposit Insurance Corporation Law*, Title 12, U.S.C., §1820; *Industrial Alcohol Act*, Title 26, U.S.C., §3119 (1946 Ed); *Export Controls Act*, Title 50, App., U.S.C., §2026; *Defense Production Act of 1950*, Title 50, App., U.S.C., §2153; *War and Defense Contracts Acts of 1951*, Title 50,

App., U.S.C., §1152; *Second War Powers Act*, Title 50, App., U.S.C., §643a; *Investment Advisers Act*, Title 15, U.S.C., §80-b-9; *Investment Companies Act*, Title 15, U.S.C., §79r; *Securities Exchange Act*, Title 15, U.S.C., §78u; *Shipping Act, 1916*, Title 46, U.S.C., § 827; *Natural Gas Act*, Title 15, U.S.C., §717m; *Federal Rules of Criminal Procedure*, Rules 42(a), 42(b).

Statement of the Case

Petitioner is a principal of Young Tempo, Inc., a New York City dress manufacturer (10A).* T. and R. Trucking Company or T. and R. Cutting Company has transported dresses for Young Tempo, Inc. and Acme Dress Company between New York City and Midvale, New Jersey (10A). John Dioguardi is, according to the Government's information, the actual owner of T. and R. Trucking Company, although Theodore Rij is the nominal proprietor (10A).

Active in the Southern District of New York are a number of grand juries conducting a general racketeering investigation, as well as an investigation of the Victor Riesel obstruction of justice case (60A..61A). The subjects of these investigations are John Dioguardi and Theodore Rij (also known as Ray) and possibly others (61A).

Petitioner appeared before two of these other grand juries pursuant to subpoena (32A). His grand jury appearances prior to this matter totaled at least eleven times (12A). Petitioner's first appearance before a grand jury related to the Riesel obstruction of justice case and the location of Rij (32A). Petitioner's subsequent appearances were before a grand jury investigating alleged racketeering in the garment trucking industry (32A).

*References thus are to the pages of the Appendix to the Appellant's Brief in the Court of Appeals filed with this petition.

At the time of the proceedings below, petitioner was still subject to the subpoena under which he appeared before the other grand juries (33A), his further appearance pursuant thereto having been adjourned.

Before the other grand juries, petitioner mainly claimed his privilege against self-incrimination, but, concededly, his testimony there "went part way into the area" with which the instant proceedings are concerned (34A, 35A).

Before the other grand juries, petitioner, and business associates were told by the same prosecutor who conducted the instant proceedings below, that petitioner was going to be indicted for violation of the Internal Revenue laws (35A).

On or about March 25th petitioner's counsel, at the prosecutor's request, attended at his office. He was told that the prosecutor was about to institute an investigation under the Interstate Commerce Act, that petitioner would be subpoenaed to appear before the Grand Jury conducting this investigation and that the immunity statute contained in the Interstate Commerce Act, Section 46, Title 49, U.S.A. (*infra*, p. 35), would apply and that the Fifth Amendment plea could not be interposed (11A, 12A).

Thereafter petitioner, having been served with a subpoena requiring his personal appearance before the April 1957 Grand Jury "to testify all and everything which you may know in regard to an alleged violation of Sections 309, 322, Title 49 United States Code" (23A), appeared before the grand jury (22A).

Petitioner's counsel was present in the anteroom of the Grand Jury room. Petitioner was advised that "the foreman, should the occasion arise, will at reasonable intervals allow you to consult with your attorney if you feel you desire to do so" (22A, 23A).

Petitioner, after the requisite preliminaries were disposed of, was asked (23A): "Mr. Brown, are you associated with Young Tempo, Incorporated?"

Petitioner requested and received permission to speak with his attorney (23A). After such consultation, petitioner returned to the grand jury room, the question was read to him again, and he answered, "I refuse to answer because by answering I may tend to incriminate myself" (24A).

The prosecutor then advised petitioner before the Grand Jury "that this Grand Jury is conducting an investigation for possible violations of the Interstate Commerce laws, * * * and that under Title 49 United States Code, (Section 305(d)), the Congress * * * has provided that any witness who is compelled to give testimony as to any matter arising under the Motor Carrier Section of the Interstate Commerce Laws * * * shall by virtue of his testimony be given immunity from federal prosecution as to any crime which might arise out of the subject matter of his testimony" and that he did "not have any privilege to plead the Fifth Amendment as to the questions which are going to be put to" him before this Grand Jury (24A, 25A).

Petitioner conferred again with counsel, returned to the grand jury room and refused to answer the question on the ground of possible self-incrimination (25A, 26A). Petitioner was then informed that, if he did not answer this question, he could "be brought before a Judge of this Court and directed to answer this and other questions?" (26A). After petitioner had again consulted with counsel (26A), the question as to his association with Young Tempo Inc. was once more put to him (26A) and he refused to answer on the ground of possible self-incrimination (27A).

Thereafter five more questions were put to the petitioner before the grand jury, all of which petitioner refused to answer on the ground of possible self-incrimination (27A-29A).

The questions answer to which was refused by petitioner because of possible self-incrimination are:

1. Mr. Brown, are you associated with Young Tempo, Incorporated? (23A).
2. Mr. Brown, does Young Tempo, Incorporated, use a trucking company known as the T & R Cutting Company or as the T & R Trucking Company? (27A)
3. Mr. Brown, who do you know to be the owner or owners or the principal in interest or principals in interest of the T & R Cutting or the T & R Trucking Company? (27A)
4. Mr. Brown, are you associated with the Acme Dress Company, in Midvale, New Jersey? (28A)
5. Mr. Brown, does the T & R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey? (28A)
6. Mr. Brown, do you know if the T & R Trucking Company or the T & R Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey? (28A)

After the petitioner's refusal to answer the above questions, the grand jury, the Assistant United States Attorneys and the petitioner and counsel proceeded to the courtroom of District Judge Levett.

At the Court's request, the prosecutor outlined the procedure requested by the Government to be followed.

The courtroom was cleared and the proceedings throughout were private (7A).

The prosecutor stated that the grand jury requested the Court's aid and assistance in a direction to the petitioner to answer the questions put to him (7A, 8A).

Further outlining the procedure requested, the prosecutor stated that at the termination of that hearing "if the Court determines that the witness in fact must answer the questions, that the Court direct him to answer the questions" and that "at that point it would be the Government's intention to have the grand jury and the witness return to the grand jury room, at which point the same questions would be put to the witness" (9A).

Upon further refusal by the petitioner to answer on his return to the grand jury room, the prosecutor said, the grand jury and petitioner would return to the Court with a second request that the same questions be put to the witness and, if he then refused to answer, "the Government would ask that he be held summarily in contempt according to the procedure of Rule 42 (a) of the Federal Rules of Criminal Procedure, and for a violation of Section 401, Subdivision 3 [*infra*, p. 40], which makes punishable as contempt the disobedience of a lawful order of the Court" (9A).

The prosecutor also stated, at the request of the Court, the general nature of the inquiry to be that the Government's information was "that contrary to the law this T. & R. Trucking Company neither applied for nor received a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York; and Midvale, New Jersey (10A, 11A).

At this point petitioner's counsel reminded the Court that in his off-the-record discussion of procedure the

prosecutor had said "that the Government's position was that this was the only hearing" petitioner was "entitled to" and applied for and requested a reasonable adjournment and "a notice from the Government of the specifications or charges for which we are having this hearing so that we can prepare for this hearing and be able to properly represent our client", which request was denied (11A).

The existence of issues of fact was indicated to the Court by petitioner's counsel (12A, 13A, 21A, 30A).

After argument on the applicability of the immunity sections of the Motor Carriers Act, Title 49, U.S.C., Sec. 305(d) (*infra*, p. 35), the Government called the grand jury stenographer as a witness. She read her untranscribed minutes of the proceedings in the grand jury room (22A, *et seq.*). When she finished, an adjournment was requested by petitioner's attorney (30A), but not granted.

Argument was then had before the Court on the issues raised by the appearance of the petitioner before other Grand Juries (31A-38A), and on some other issues involved (38A, 39A) and on the question of the incriminatory nature of the questions put to petitioner (39A).

This part of the proceedings took place on Friday, April 5th, 1957. The parties were directed by the Court to return on Monday, April 8th at 2:00 P.M. (43A).

On Monday, April 8th, 1957 (44A) the Court rendered its decision, as follows (44A, 45A, 46A):

"In this matter I have determined that the witness must testify as to the questions which were propounded. I believe that the statutory sections, particularly Sections 305(d), Title 49 and Section 46 of Title 49 adequately provide for immunity in the instances involved; I believe that the immunity applies to a grand jury, see *Brown v. Walker*, 161 U. S. 59.

I believe in general that the immunity applies in the State Courts, see *Adams v. Maryland*, 347 U. S. 179.

The immunity exists even though no privilege is claimed, see *U. S. v. Monia*, 317 U. S. 424.

The United States Attorney is charged with enforcement of the United States criminal laws and under the Rules of Criminal Procedure I believe that the witness must answer. Therefore I direct this witness, Emanuel Brown, to answer the questions propounded as they were repeated before me on Friday".

"I do not think the fact that this witness has testified before other grand juries affects this situation. I have considered it. I do not believe that it is pertinent at all here. He is immune from prosecution for all matters on which he is questioned before this grand jury. That covers it."

The grand jury was then directed by the Court to retire (46A). Counsel for petitioner requested an adjournment to consult with his client (45A). A postponement for thirty minutes was granted (46A).

Petitioner, pursuant to the Court's direction, returned to the grand jury room and the six questions directed by the Court to be answered were again put to him (49A, 50A).

Petitioner refused to answer on the ground of possible self-incrimination (49A, 50A). The grand jury, petitioner and counsel then proceeded again to the courtroom of District Judge Levet (47A).

At that time the prosecutor stated to the Judge that the grand jury "again wishes to request the aid and assistance of the Court with reference to the witness Emanuel Brown (petitioner)". (47A).

Discussion was then had again as to the nature of this proceeding (47A, 48A).

The prosecutor said (47A): "At this point the grand jury is still merely requesting the assistance of the Court. What the Government would request is that if it appears, * * * that the witness is persisting in his refusal, the Government will then request of this Court that the Court itself, in the presence of the grand jury, will put the six questions to the witness and ask him, first, whether he is willing to answer them now, and, second, would he answer them if he were sent back to the grand jury again. And if the witness again refuses here and now in the physical presence of the Court or persists in his refusal to answer, that the witness be held in summary contempt under Rule 42 (a) of the Federal Rules of Criminal Procedure."

And the Court stated "That is what I propose" (48A).

Counsel for petitioner excepted to this procedure and requested compliance with Rule 42 (b) (*infra*, p. 39) and a notice of the charges and specifications and an opportunity for a full hearing (48A). The public was excluded.

This request and objection were overruled (48A). The grand jury stenographer was then called and read his untranscribed minutes (48A, *et seq.*) which disclosed petitioner's refusal before the grand jury to answer the questions set forth above on the ground of possible self-incrimination.

The Court, over objection and exception, directed appellant (51A) to take the stand in the courtroom.

Petitioner's counsel also objected on the ground that petitioner was being compelled to be a witness in a criminal cause against himself, which objection was overruled (51A).

The Court did not swear the petitioner, but deemed him to be under oath since he had been sworn in the proceedings before the grand jury, it being the Court's theory that this proceeding was "a continuance of the Grand Jury proceeding before the Court" (52A). Petitioner's counsel took further exception and objection to this proceeding (52A).

The Court then put to petitioner the same six questions (*supra*, p. 8) over the specific objection of petitioner's counsel to each question (52A-54A) and as to each question petitioner refused to answer on the ground of possible self-incrimination (52A-54A).

The Court, repeating each question then directed the petitioner to answer, which interrogation and directions were done over the objection of petitioner's counsel (55A-57A).

To each of the questions and directions petitioner maintained his refusal to answer on the ground of possible self-incrimination (55A-57A).

At the Government's request the Court then asked petitioner "whether he would maintain his refusal to answer, if he returned to the grand jury room" which inquiry was made over the objection of petitioner's counsel (57A). Petitioner answered this inquiry in the affirmative (57A).

Petitioner was then asked, over counsel's objection, whether he believed that these answers would incriminate him in any way and petitioner refused to answer (57A).

The Court then stated that "by reason of petitioner's refusal to answer in the actual presence of this Court, I am forced to act upon this matter" (58A). Counsel for petitioner objected to the whole proceeding and asked again for notice and specifications and an opportunity to be heard, which objection and request were overruled (58A).

The Court then permitted counsel to argue as to why an adjudication of contempt should not be made (58A, which counsel did (59A, *et seq.*).

Petitioner's counsel argued, *inter alia*, that the purported immunity did not exist, that petitioner should have a full hearing on the issues of fact involved herein, that the whole procedure was bad and objectionable on the ground that, irrespective of the question of immunity, petitioner's constitutional rights in a criminal cause were seriously infringed by his being compelled to take the stand and being sworn and being asked questions, that in this proceeding, entirely separate and apart from the grand jury proceedings, it was wrong to ask petitioner as to whether he believed that answering the questions would incriminate him and that the failure to give petitioner notice and an opportunity to defend was in violation of due process and of petitioner's rights under the Constitution and that the proceeding was being used by the United States Attorney as a device or subterfuge or artifice to circumvent petitioner's constitutional rights (59A-60A).

The Court nonetheless adjudicated petitioner in contempt (60A).

Counsel for the government was then heard by the Court on the question of sentence and in that regard counsel for the Government said, among other things, the following (61A, 62A):

"For these reasons . . . , the Government here would ask for a substantial sentence, and that is done not so much for any punitive effect as it would be for the coercive effect of the sentence.

Under the statute there is no maximum penalty upon the sentence that your Honor may impose. The only maximum is that imposed by the Constitution against cruel and unusual punishment.

I would further ask . . . that . . .
your Honor not include a purge clause. . . .

Following this request by the United States Attorney for a coercive sentence rather than a punitive sentence, the Court sentenced the petitioner to be confined for a period of one year and three months (64A).

Argument

The reasons relied on by petitioner for the allowance of the writ are these:

1. The decision below is in conflict with the decisions of other Courts of Appeals on the same matter;
2. The Court below has rendered a decision in conflict with applicable decisions of this Court;
3. The Court below has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the Trial Court as to call for an exercise of this Court's power of supervision;
4. The Court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

I.

In deciding that a witness who testified in a grand jury inquiry as to possible offenses under §322 (*infra*, p. 43) of the Motor Carriers Act obtained immunity pursuant to Section 305(d) (*infra*, p. 35) "just as if they were testifying in a grand jury inquiry under Title I" (Interstate Commerce Act, Title 49 U.S.C. §46, *infra*,

p. 35), the Court of Appeals decided important questions of Federal law which have not been but should be settled by this Court.

The Motor Carriers Act does not have a separate immunity provision and Congress in §305(d) (*infra*, p. 35) of that act incorporated by reference the immunity provision contained in §46 (*infra*, p. 35) of the original Interstate Commerce Act.

In determining whether a witness obtains immunity by his testimony before a specific body, it is necessary always to determine whether the particular immunity statute by its terms applies to the body before which the witness is appearing—here a grand jury.

The statute here involved [§305(d), Motor Carriers Act (*infra*, p. 35)] provides first for the power of the Commission to administer the Act and to require by subpoena the attendance and testimony of witnesses and the production of books and documents and to take testimony by deposition.

This grant of power contained in the first clause of §305(d) is then modified by the language “relating to any matter under investigation, as the commission has in a matter arising under Chapter 1 of this title [Title 49, U.S.C.]”

Following this modifying phrase is a semi-colon and a second clause is then set forth reading “and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same • • • immunities • • • as though such matter arose under Chapter 1 of this title, unless otherwise provided in this chapter.”

In statutory construction, this Court has held, “punctuation marks are no part of an act” and “to determine the intent of the law, the court • • • will disregard

the punctuation" (*U. S. v. Shreveport Grain & E. Co.*, 287 U. S. 77, 82, 83). Consequently, the whole of §305(d) of the Motor Carriers' Act must be read together.

In the first clause of subdivision (d) of Section 305 the power of the Commission to take testimony and to compel the production of papers relates "to any matter under investigation". Then in the second clause the grant of immunity is limited to "any person subpoenaed or testifying in connection with any matter under investigation under this chapter." Necessarily the re-use of the words "in connection with any matter under investigation under this chapter" discloses an intent by Congress to relate back to the prior use of the same words "any matter under investigation" in the first clause of Section 305(d) and, therefore, an intent to limit the immunity to investigations before the Commission and not to extend the immunity to investigations by grand jury.

It is a necessary implication in the second clause of Section 305(d) after the words "any matter under investigation" that the words "by the Commission" be inserted. Congress having used these words before in the same sentence and having limited those provisions to the Commission obviously did not deem it necessary as a matter of draftsmanship to repeat the words "by the Commission"; as ordinary rules of statutory construction would necessarily require their implication.

The language chosen by Congress in effect displaced and excised from §46 of the Interstate Commerce Act as made applicable to the Motor Carriers Act by §305(d) the words "testifying . . . in any cause or proceeding criminal or otherwise based upon, or growing out of any alleged violation of Chapter 1".

If Congress intended the immunity to extend to grand jury proceedings and proceedings other than before the

Commission it must be held to have known "the phraseology necessary to reach this result" (Crane, J., *Matter of Doyle*, 257 N. Y. 244, 268, 269).

The words of art necessary and most often used for the purpose of extending the immunity to grand jury or court proceedings are "in any proceeding" or "in any suit or proceeding" or "in any cause or proceeding, criminal or otherwise" or "in any action or proceeding" or "in any cause or proceeding instituted by the Commission" or "in any proceeding, suit or prosecution". See *Federal Communications Act*, Title 47, U.S.C., §409(l) (*infra*, p. 52); *Civil Aeronautics Act*, Title 49, U.S.C.A. §644(i) (*infra*, p. 47); *Second War Powers Act*, (1946), Title 50 U.S.C., App. §643(a) (*infra*, p. 49); *War and Defense Contracts Acts* (1946), Title 50 U.S.C., App., §1152 (*infra*, p. 49); *Shipping Act of 1916*, Title 46, U.S.C., §827 (*infra*, p. 51); *Industrial Alcohol Act*, Title 26, U.S.C. (1946 ed.), §3119 (*infra*, p. 47), now §5315, Title 26 U.S.C.; *Securities Act of 1933*, Title 15, U.S.C., §77v (c) (*infra*, p. 37); *Securities Exchange Act*, Title 15, U.S.C., §78u (d) (*infra*, p. 51); *Public Utility Holding Company Act*, Title 15, U.S.C., §79r (e) (*infra*, p. 50); *Natural Gas Act*, Title 15, U.S.C., §717m (h) (*infra*, p. 52); *Investment Advisers Act*, Title 15, U.S.C., §80-b-9 (d) (*infra*, p. 50); *Investment Companies Act*, Title 15, U.S.C., §80a-41 (d) (*infra*, p. 50).

Actually, it is not the inclusion of the words "before the Commission" which is necessary to limit immunity to testimony before the Commission, it is the use of the foregoing phraseology "in any cause or proceeding" or the other similar language which is required to extend the immunity power to grand juries or court proceedings; these words or words of similar import having been held by this Court in *Hale v. Henkel*, 201 U. S. 43, 66 (1906) to extend immunity to grand jury and court proceedings.

Here the use by Congress in §305(d) of the Motor Carriers Act, of the language "testifying in connection with any matter under investigation under this chapter", which operated to remove the language "any cause or proceeding, criminal or otherwise" from §46 as incorporated into §305(d), prevented and prevents the immunity provisions from extending to grand jury proceedings.

The enactment by Congress of an immunity provision limited to hearings or investigations by a Commission and insufficient in scope to extend to Grand Jury investigations is not. See *Federal Trade Commission Act*, Title 15, U.S.C.A., Ch. 2, §49 (*infra*, p. 36); *Taft-Hartley Act*, Title 29, U.S.C., 161(3) (*infra*, p. 38); *Merchant Marine Act*, 1936, Title 46, U.S.C., §1124(c) (*infra*, p. 37); *Perishable Commodities Act*, Title 7, U.S.C., §499m(f) (*infra*, p. 38); *China Trade Act*, Title 15, U.S.C., §155(a), (c) (*infra*, p. 40); *Social Security Act*, Title 42, U.S.C., §405(d), (f) (*infra*, p. 41); *Atomic Energy Act*, Title 42, U.S.C., §2201 (*infra*, p. 41); and the *Rent Control Act*, Title 50, App., U.S.C., §1896 (*infra*, p. 42).

It should be noted that §305(d) of the Motor Carriers Act is not the only enactment by Congress which, although incorporating §46 of the Interstate Commerce Act by reference, did not extend the immunity power beyond the particular administrative officer or board involved. See *Commodity Exchange Act*, Title 7, U.S.C. (1946 ed.), §15 (*infra*, p. 45); *Emergency Price Control Act*, §202(g), 56 Stat. 30 (1942) (*infra*, p. 45); See also *Export Controls Act*, Title 50, U.S.C., App., §2026(a) and (b) (*infra*, p. 47). [In the *Narcotics Control Act*, Title 18, U.S.C., §1406 (*infra*, p. 51), the *Immunity Act of 1954*, Title 18, U.S.C., §3486 (*infra*, p. 45) and the *Defense Production Act of 1950*, Title 50, U.S.C., App., §2155(a), (b) (*infra*, p. 48), Congress specifically

mentioned the grand jury as a body before which immunity may be obtained. In the Federal Deposit Insurance Corporation Law, Title 12 U.S.C., §1820(c), (d) (*infra*, p. 46), while the Board of Directors may apply to a judge or clerk of any United States Court for a subpoena, the immunity power extends only to a hearing, examination or investigation by the Board].

Illustrative of the converse of the situation which confronts the petitioner here is the case of *Blaine v. United States*, 29 F. 2d 651 (C.A., 5th) which arose under the National Prohibition Act which provided in §47, 27 U.S.C.A. (1927 ed.) that "no person shall be excused, on the ground that it may tend to incriminate him * * * from * * * testifying * * * in obedience to a subpoena of any court in any suit or proceedings based upon or growing out of any alleged violation of this chapter.

In the *Blaine* case, *supra*, one of the defendants claimed immunity under this provision of the National Prohibition Act, on the ground that he appeared and gave evidence of a revocation hearing conducted by the Prohibition Administrator. The Court of Appeals held that he had not brought himself within the terms laid down by the statute "for the reason that he did not testify in obedience to the subpoena of any court". See *Sherwin v. United States*, 268 U. S. 369.

Even if it were to be held that the District Court and the Court of Appeals were correct in holding that §305(d) incorporated §46 *in toto*, the question then arises as to whether the immunity attempted to be provided is constitutionally sufficient, that is, whether it is co-extensive with the petitioner's constitutional privilege against self-incrimination. *Counselman v. Hitchcock*, 142 U. S. 547.

§305(d) commences with the language "so far as may be necessary for the purposes of this chapter". This language is a limitation of the immunity and makes it futile and worthless.

If, for example, the Government in the questioning of petitioner before the grand jury went beyond the concededly incriminatory questions put to the petitioner, which we assume *arguendo* to be relevant to an investigation under the Motor Carriers Act, and inquired as to matters beyond the scope of such an investigation, such as possible Internal Revenue violations and other offenses, is it not possible for the Government then to argue that all that was done before the grand jury which was necessary for the purposes of the Motor Carriers Act were the questions now asked of the petitioner and that all the other inquiries were not so necessary and the immunity consequently did not apply?

If the Government were correct in such an argument, then petitioner, deprived of his privilege by this immunity provision, would be liable to prosecution based on his own testimony, if the same were incriminatory.

Petitioner would also, if this possible Government argument were made and upheld as to the limitation on the immunity provision, be in this position—having been asked concededly incriminatory questions at the very outset of the investigation and having, let us suppose, failed *in limine*, contrary to his action here, to claim his privilege against self-incrimination—he would be deemed to have waived the privilege and would then be liable in contempt for failing to answer in the other fields of investigation or to indictment on the crimes, if any, disclosed by his testimony other than on matters under the Motor Carriers Act. *Cf., U. S. v. Price*, 96 Fed. 960 (D. Ky.).

Even if petitioner in answering the questions involved here touched incidentally upon other crimes, it would be open to the Government to argue that such testimony was not necessary for the purposes of the Motor Carriers Act.

Consequently, it is submitted, the immunity purported to be granted by Section 305(d) is not co-extensive with the privilege.

The immunity purportedly granted is not co-extensive with the privilege of the petitioner against self-incrimination for the further reason that he has been before two other grand juries in the Southern District of New York, in the course of which he was told by the prosecutor that he is a prospective defendant. The petitioner continues under subpoena to appear before the other grand juries.

In this situation the Government in the present investigation of possible violations of the Motor Carriers Act may develop clues and leads which will furnish it with evidence which it can use before the other grand juries for the purpose of incriminating petitioner and causing his indictment and prosecution.

Consequently, despite the language of §46, Title 49, U.S.C., the petitioner's situation is markedly similar to that of the witness in *Counselman v. Hitchcock*, *supra*, where this Court said at page 564:

"It remains to consider whether §860 of the Revised Statutes removes the protection of the constitutional privilege of Counselman. . . . It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testi-

mony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

"The constitutional provision distinctly declares that a person shall not 'be compelled in any criminal case to be a witness against himself;' and the protection of §860 is not co-extensive with the constitutional provision."

The application of §305(d) and §46 to petitioner raises, consequently, substantial and important questions of Federal law which have not been but should be settled by this Court [also pending in the Court of Appeals for the Second Circuit is another case entitled *U. S. v. Morry Levine*, which involves *inter alia* the same questions under §305(d) and §46 as herein embraced].

II.

This case presents to this Court for review the validity of the proceedings in the Second Circuit for the handling of recalcitrant grand jury witnesses before grand juries. Cf. *U. S. v. Curcio*, 234 F. 2d 470 [Certiorari granted 1 L. Ed. (2d) 45, reversed on other grounds 1 L. Ed. (2d) 1225].

The procedure followed here by the District Court and approved by the Court of Appeals is, it is respectfully submitted, in direct conflict with the holding of the First Circuit Court of Appeals in *Carlson v. U. S.*, 209 F. 2d 209, and of the Court of Appeals for the District of Columbia in *Wong Gim Ying v. U. S.*, 231 F. 2d 776, 779, 780 [see also *Powell v. U. S.*, 226 F. 2d 269 (App. D.C.)].

The procedure approved below is also in conflict with the decision of this Court in *Ex Parte Savin*, 131 U. S. 267, 277.

Moreover, this procedure followed in the Second Circuit has the effect of obliterating subdivision (b) of Rule 42 of the Rules of Criminal Procedure insofar as applicable to the recalcitrant grand jury witnesses.

The rights of a witness claimed to be recalcitrant and criminally contumacious before a grand jury have been well established.

Rule 42(b) (*infra*, p. 39) of the Rules of Criminal Procedure requires that criminal contempts shall be prosecuted on notice, stating the place and time of hearing and the essential facts constituting the criminal contempt charge and allowing a reasonable time for the preparation of the defense.

Rule 42(b) is of course only the application to criminal contempts of the requirements of due process contained in the Fifth Amendment (*infra*, p. 39) to the Constitution and the fundamental fairness required to be a necessary attribute of Federal criminal procedure.

But the rights of a party to a criminal contempt proceeding go beyond mere notice, opportunity to prepare and hearing. The usual safeguards surrounding criminal prosecution must be afforded to the party. *Cammer v. U. S.*, 350 U. S. 399, 403; *Re Michael*, 326 U. S. 224; *Nye v. U. S.*, 313 U. S. 33. Otherwise "too great inroads on the procedural safeguards of the Bill of Rights" would be permitted. *Re Michael*, *supra*, 227.

As pointed out in *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 444:

"* * * it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt and cannot be compelled to testify against himself."

Measured against these basic requirements of a proceeding in criminal contempt, namely notice, opportunity to prepare, hearing, presumption of innocence, proof of guilt beyond a reasonable doubt and the witness' right not to testify against himself, the proceedings in this case and in other similar cases in the Second Circuit fall far short and obviously constitute merely a putatively clever device to circumvent these principles and to deprive the witness of his rights.

The procedure here and in other such proceedings in the Second Circuit are so contrived that the commission of the alleged contempt and the adjudication is one inter-related action.

The sudden and almost miraculous transmutation of a proceeding (described not as a hearing but merely an attempt to obtain the assistance of the Court) into a criminal contempt done in the presence of the Court (although actually done, if at all, in the presence of the grand jury in its room) which is the hallmark of this type of proceedings in the Second Circuit is the means which enable the Government to debase the fundamental rights of parties which adhere to any criminal proceeding including one for criminal contempt.

The claim that the proceeding was merely an attempt to secure the assistance of the Court in obtaining the testimony of the petitioner is self-evidently spurious. Is it not clear that from the time that the petitioner first appeared before the District Judge at the direction of the grand jury until the time when the District Court finally directed him, question by question to answer, the petitioner was in jeopardy and faced, in view of the announced purpose of these proceedings in the Second Circuit and their characteristic endings, a finding of criminal contempt purportedly committed in the presence

of the Court and, hence, put on the defense of his claimed right not to answer these questions and of his conduct?

It is no answer to petitioner's contention to say that he had a hearing, in that the Court listened to his counsel's arguments, when he was not permitted to make any defense on the issues of fact existent in the matter and his presumption of innocence was abrogated and he was compelled to take the stand.

Besides it was, if a hearing, held before the offense, if any, was committed—certainly a novel doctrine.

The correct procedure in a situation such as is presented here is very well set forth in *Carlson v. U. S.*, 209 F. 209, 216 (C.A., 1) and *Wong Gim Ying v. U. S.*, 231 F. 2d 776, 779, 780.

In the *Carlson* case the Court described the proper procedure, as follows: If the witness is recalcitrant on the ground of his claim of possible self-incrimination, he is to be brought before the Court and the Court is to rule on the availability of the witness' claim of privilege; if the privilege is overruled by the Court, it "would then normally instruct the witness to go back to the grand jury and answer the question. If the witness then and there, in the face of the Court, declined to do so, this is disobedience to a lawful order of the Court, under 18 U.S.C., Section 401(3); and since this disobedience occurs in the 'actual presence' of the Judge it may be punished summarily under Rule 42(a) [*infra*, p. 39]."

Hence, according to the *Carlson* case, if at this point the witness *refuses to return* to the grand jury room and answer the questions, it is his *refusal to return*, which is a contempt committed in the presence of the Court and punishable summarily.

But, if the witness returns to the grand jury room the First Circuit said in *Carlson* at page 216:

“* * * and there again refuses to answer the question which the court directed him to answer, this is still disobedience of a lawful order of the court within the meaning of 18 U.S.C. §401(3). But because such disobedience did not take place in the actual presence of the court, and thus could be made known to the court only by the taking of evidence, the court would have to conduct the proceeding in criminal contempt in accordance with Rule 42(b).”

It is at this point where Second Circuit proceedings branch off from the proceedings outlined in the *Carlson* case as proper and proceed post-haste to the deprivation of the witness' fundamental rights.

In the *Carlson* case, it was made clear that, at this point, if the witness still claimed his privilege, it was not a criminal contempt proceeding and the “worst that could happen, if the ruling is against him (the witness), is that he would be given a second chance to go before the grand jury and answer the questions”. Cf., *Powell v. U. S.*, 226 F. 2d 269.

If, on the other hand, he is being charged with misconduct in the jury room, constituting misbehavior in the presence of the Court, the Court in *Carlson* said that “this charge must be prosecuted on notice, and under Rule 42(b) the notice ‘shall state the essential facts constituting the criminal contempt charged and describe it as such’”.

Then specifically directing itself to a situation identical with that presented by this case, the Court said at page 216:

“If the charge of criminal contempt is that the witness declined to answer the questions upon the pretended ground that the answers would tend to incriminate him, this claim of privilege being ad-

vanced in bad faith, then (assuming that such conduct might be deemed misbehavior in the presence of the court within the meaning of 18 U.S.C. §401(1) [*infra*, p. 42]) the required notice under Rule 42(b) would have to describe the alleged misbehavior in order that the witness, in preparing his defense to the charge, may direct his evidence to the issue of his good faith in claiming the privilege."

It is respectfully submitted that this procedure outlined in the *Carlson* case is obligatory in a proceeding such as presented by this case and because not followed the proceedings here are vitiated.

Especially applicable here is the language of this Court in *Re Oliver*, 333 U. S. 257, 275:

"Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case [267 U. S. 517] requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public'.

And in the *Oliver* case this Court said that "the right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of 'demoralization of the Court's authority'." 333 U. S. 257, 278.

Because of the existence of Rule 42(b) (*infra*, p. 39) it is quite clear that Rule 42(a) can only apply to acts actually done in the presence of the Court which tend to demoralize the Court's authority before the public. Since, however, the refusal of the witness to testify before a grand jury occurs in a grand jury room, what reason can there be to invoke Rule 42(a) in the manner followed here other than to circumvent Rule 42(b) and to do indirectly what cannot be done directly? *Wong Gim Ying v. U. S.*, *supra*.

Thus a strange procedure has been established in which a witness is compelled to commit the allegedly wrongful act again in the presence of the Court so that his rights and privileges can be avoided.

The conflict between the decision here and those of other Courts of Appeal and with decisions of this Court is clear. Moreover there has been such a departure here from the usual course of judicial proceedings, as to call for this Court's power of supervision.

III.

The Court of Appeals held that the District Court had the right to compel petitioner to take the stand and to answer questions. It specifically held that the proceeding was not a criminal proceeding but merely one which was "ancillary to the grand jury investigation".

The Court of Appeals also held that to prevent the District Court "from inquiring of the witness whether he is willing to answer questions, would frustrate the proper operations of the grand jury * * *" and that the "Court is merely being advised as to what had already happened before the grand jury". This latter holding of the Court of Appeals is directly contrary to the holding

of this Court in *Ex Parte Savin*, 131 U. S. 267, 277, where Mr. Justice Harlan said:

"It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts, and punish the offender, without further proof and without issue or trial in any form' * * *; whereas, in cases of misbehavior of which the Judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished."

Here the District Court knew of the contempt only through the confession of the petitioner obtained in violation of his fundamental rights in a criminal case not to take the stand and testify and through the testimony of others, namely, the Grand Jury stenographer. Under *Ex Parte Savin*, *supra*, and Rule 42(b) of the Rules of Criminal Procedure, the practice followed here was consequently invalid and improper.

With respect to the first ground stated by the Court of Appeals for the rejection of petitioner's contention that he should not have been compelled to take the stand before the District Court, namely, that the proceeding was not a criminal proceeding and merely ancillary to the grand jury investigation, the fact is that from the moment petitioner was returned to the District Court after having refused for the second time to answer the questions put to him before the grand jury, he was in jeopardy of his liberty and the proceeding was, therefore, criminal in nature. Whether ancillary or plenary, or merely, as the

District Court thought, an extension of the grand jury proceeding, jeopardy for the petitioner existed and the proceeding was criminal in nature.

This Court has held that in proceedings which result in a judgment of criminal contempt, the defendant is entitled to the rights accorded to the defendant in criminal cases. *Cammer v. U. S.* 350 U. S. 399, 403; *Re Michael*, 326 U. S. 224; *Nye v. U. S.*, 313 U. S. 33; *Michaelson v. U. S.*, 266 U. S. 42, 66; *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 444.

And, as pointed out by Judge Goddard, in *U. S. v. Lawn*, 115 F. Supp. 674, 677, it is in a criminal case "a clear violation of a defendant's right against self-incrimination under the Fifth Amendment of the Constitution to compel him to take the stand, testify and produce his records, relating to the matter with which he is charged . . . it would invalidate the trial. . . . Title 18 U.S.C.A., Section 3481 makes a defendant a competent witness at his own request. It is thus improper to call him as a witness without a request on his part". *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 444; See *U. S. v. Scully*, 225 F. 2d 113 (C.A. 2nd).

These basic and important questions of constitutional law affecting criminal contempt proceedings and the differing procedures followed in the several circuits make necessary the review of this case by this Court.

IV.

In this case petitioner received a sentence of one year and three months. The Court of Appeals held that the sentence did not violate the Eighth Amendment to the Constitution (*infra*, p. 44) and that it was not an abuse of the District Court's discretion and that the District

Court could impose a coercive sentence in a criminal contempt proceeding without providing a purge clause.

In *U. S. v. Green*, 241 F. 2d 631 (C.A. 2d) this Court has granted certiorari, 1 L. Ed. 2d Adv. 1135. In the *Green* case two of the questions involved are also here presented.

These questions are whether the sentence was an abuse of discretion of the District Court and whether the District Court in a criminal contempt proceeding could impose a sentence of more than one year.

The Court of Appeals here held the sentence proper in view of the sentences in *Warring v. Huff*, 122 F. 2d 641 (App. D.C.) [two consecutive sentences of thirteen months]; *Conley v. U. S.* 59 F. 2d 929 (C.A., 8) [two years]; and *Hill v. U. S.*, 300 U. S. 105 [concurrent sentences of a year and a day and two years.]

On the other hand the Court of Appeals ignored much lesser sentences imposed by District Courts in its circuit upon recalcitrant grand jury witnesses. In *U. S. v. Gordon*, 236 F. 2d 916, the sentence was six months. In *U. S. v. Courtney*, 236 F. 2d 921, the sentence was three months. In *U. S. v. Trock*, 232 F. 2d 839, the sentence was four months. In *U. S. v. Curcio*, 234 F. 2d 470, the sentence was six months. In *U. S. v. Weinberg*, 65 F. 2d 394, the sentence was sixty days.

Both the District Court and the Court of Appeals omitted to consider as an element in determining the sentence the penalty attached by Congress to the substantive criminal offense involved. Here, under Section 322 of the Interstate Commerce Act, the only punishment which could be imposed upon petitioner is a fine. This failure to consider the quantum of the penalty attached to the substantive criminal offenses is in conflict with *Moore v. U. S.*, 150 F. 2d 323 (C.A. 10th). The United

States attorney did not request a specific sentence but insisted upon a strong coercive sentence, as he characterized it (60A-63A) and this sentence was the result.

This Court has held that the sentence in a criminal contempt proceeding must be punitive and not coercive. *U. S. v. United Mine Workers*, 330 U. S. 258, 302. On the other hand, if the sentence could be coercive, a purge clause necessarily had to be included which was not done here.

CONCLUSION

The writ should be granted and the judgment below reviewed by this Court.

For which your petitioner will forever pray, etc.

Respectfully submitted,

By J. BERTRAM WEGMAN and
MYRON L. SHAPIRO,

his counsel.

Dated August 5, 1957

APPENDIX TO PETITION

Statutes and Rules Involved

Motor Carriers Act, Immunity Provision, Title 49, U.S.C., Ch. 8, Section 305(d):

“So far as may be necessary for the purposes of this chapter, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpoena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title; and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, unless otherwise provided in this chapter.”

Interstate Commerce Act, Immunity Provision, Title 49, U.S.C., Ch. 2, Section 46:

“No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of

him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than \$100 nor more than \$5,000, or by imprisonment for not more than one year or by both such fine and imprisonment."

Federal Trade Commission Act, Immunity Provision,
Title 15, U.S.C., Ch. 2, Section 49:

"For the purposes of sections 41-46 and 47-58 of this title the commission, * * * shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. * * *

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or sub-

jected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it”

Securities Act of 1933, Immunity Provision, Title 15, U.S.C., Ch. 2A, Section 77v (c):

“No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.”

Merchant Marine Act, 1936, Immunity Provision, Title 46, U.S.C., Section 1124(c):

“No person shall be excused from attending and testifying or from producing books, papers, or other documents before the Commission, or any member or officer or employee thereof, in any investigation instituted by the Commission under this chapter, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him

to a penalty or forfeiture; but no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, * * *."

Perishable Commodities Act, Immunity Provision, Title 7, U.S.C., Section 499m (f):

"No person shall be excused from attending, testifying * * * before the Secretary or any officer or employee designated by him, in obedience to the subpoena of the Secretary or any such officer or employee, in any cause or proceeding, based upon or growing out of any alleged violation of this chapter, * * * upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him * * *. But no natural person shall be prosecuted * * * for or on account of any transaction, matter, or thing, concerning which he is compelled under oath so to testify, * * * before the Secretary or any officer or employee designated by him, in obedience to the subpoena of the Secretary, or any such officer or employee, * * * or in any such cause or proceeding: * * *."

Taft-Hartley Act, Immunity Provision, Title 29, U.S.C., Section 161(3):

"No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted

* * * for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, * * *."

Federal Rules of Criminal Procedure:

Rule 42. Criminal Contempt

"(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the fact and shall be signed by the judge and entered of record.

"(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Code of Criminal Procedure:

§401. Title 18, U.S.C. Power of court

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

§3481, Title 18, U.S.C. Competency of accused

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

China Trade Act, Title 15, U.S.C., § 155.

"(a) For the efficient administration of the functions vested in the registrar by this chapter, he may require, by subpoena issued by him * * *

(1) the attendance of any witness and the production of any book, paper, document, or other evidence. * * * The registrar, or any officer, employee, or agent of the United States authorized in writing by him, may administer oaths and examine any witness * * *

“(c) No person shall be excused from so attending and testifying * * * on the ground that the testimony * * * required of him may tend to incriminate him * * * but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, he may so testify * * *.”

Social Security Act, Immunity Provision, Title 42, U.S.C., § 405, (d) (f).

“(d) For the purpose of any hearing, investigation, or other proceeding authorized or directed under sections 401-409 of this title, or relative to any other matter within his jurisdiction hereunder, the Administrator shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the Administrator * * *.”

“(f) No person so subpoenaed or ordered shall be excused from attending and testifying * * * on the ground that the testimony or evidence required of him may tend to incriminate him * * * but no person shall be prosecuted * * * for, or on account of, any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence * * *.”

Atomic Energy Act, Immunity Provision, Title 42, U.S.C., § 2201.

“(c) make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter, or in the administration or enforcement of this chapter, or any regulations or

orders issued thereunder. For such purposes the Commission is authorized to administer oaths and affirmations, and by subpoena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place. No person shall be excused from complying with any requirements under this paragraph because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893, shall apply with respect to any individual who specifically claims such privilege."

Rent Control Act, Immunity Provision, Title 50, U.S.C., War App., § 1896.

"(f) (1) The Housing Expediter is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information, as he deems necessary or proper to assist him in prescribing any regulation or order under this Act * * * or in the administration and enforcement of this Act * * * and regulations and orders prescribed thereunder.

"(3) For the purpose of obtaining information under this subsection, the Housing Expediter may by subpoena require any person to appear and testify or to appear and produce documents, or both, at any designated place. * * *

"(6) No person shall be excused from attending and testifying or producing documents or from complying with any other requirement under this subsection because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 [section 46 of Title 49], shall apply with respect to any individual who specifically claims such privilege."

Motor Carriers Act, Title 49, U.S.C., § 322.

"Any person knowingly and willfully violating any provision of this chapter, or any rule, regulation, requirement; or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than \$100 for the first offense and not more than \$500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

• • • • •

"(c) Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give, or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this chapter, or who by means of any false statement or representation or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this chapter for less than the applicable rate, fare, or charge, or who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this chapter provided for motor carrier or brokers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than \$500 for the first offense and not more than \$2,000 for any subsequent offense.

"(d) Any special agent, accountant, or examiner who knowingly and willfully divulges any fact or

information which may come to his knowledge during the course of any examination or inspection made under authority of section 320 of this title, except as he may be directed by the Commission or by a court or judge thereof, shall be guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than \$500 or imprisonment for not exceeding six months, or both."

United States Constitution, Amendments V, VI and VIII.

V

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"

VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense;"

VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Commodity Exchange Act, Title 7, U.S.C., § 15.

“For the purpose of securing effective enforcement of the provisions of this chapter, the provisions, including penalties, of sections 12 and 46-48 of Title 49, as amended and supplemented relating to the attendance and testimony of witnesses, the production of documentary evidence, and the immunity of witnesses, are made applicable to the power, jurisdiction, and authority of the Secretary of Agriculture, the said commission, and said referee in proceedings under this chapter, and to persons subject to its provisions.”

Immunity Act of 1954, Title 18, U.S.C., § 3486,

“(c) Whenever in the judgment of a United States attorney the testimony of any witness . . . in any case or proceeding before any grand jury or court of the United States involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, . . . is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture.”

Emergency Price Control Act, 56 Stat. 30 (1942)
§ 202.

“(a) The Administrator is authorized to make such studies and investigations, and to obtain such information as he deems necessary or proper to

assist him in prescribing any regulation or order under this Act or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

“(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

“(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 * * * shall apply with respect to any individual who specifically claims such privilege.”

Federal Deposit Insurance Corporation Law, Title 12, U.S.C., § 1820.

“(a) The Board of Directors shall administer the affairs of the Corporation fairly and impartially and without discrimination. * * *

“(c) For the purpose of any hearing under this chapter, the Board of Directors, any member thereof or any person designated by the Board of Directors to conduct any such hearing, is empowered to administer oaths and affirmations, subpoena any officer or employee of the insured bank, compel his attendance, take evidence, * * *. For the purpose of any hearing, examination, or investigation under this chapter, the Board of Directors may apply to any judge or clerk of any court of the United States * * * to issue a subpoena commanding each person to whom it is directed to attend and give testimony * * * at a time and place and before a person therein specified. * * *

“(d) No person shall be excused from attending and testifying or from producing books, records, or other papers in obedience to a subpoena issued under the authority of this chapter (on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture; * * *

Industrial Alcohol Act, 53 Stat. 363, §3119, Title 26, U.S.C. (1946 Ed.), p. . .

“No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpoena of any court in any suit or proceeding based upon or growing out of any alleged violation of this part; * * *

Civil Aeronautics Act, Title 49, U.S.C., Ch. 9, §644(i).

“(i) No person shall be excused from attending and testifying, or from producing books, papers, or documents before the Board, or in obedience to the subpoena of the Board, or in any cause or proceeding, criminal or otherwise * * * on the ground, or for the reason, that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; * * *

Export Controls Act, Title 50, App., U.S.C., §2026.

“(a) To the extent necessary or appropriate to the enforcement of this Act * * * the head of any department or agency exercising any functions hereunder (and officers or employees of such department or agency specifically designated by the head thereof) may make such investigations and obtain such

information from, require such reports or the keeping of such records by, make such inspection of the books, records, and other writings, premises, or property of, and take the sworn testimony of, any person. In addition, such officers or employees may administer oaths or affirmations, and may by subpoena require any person to appear and testify * * *.

“(b) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (27 Stat. 443) * * * shall apply with respect to any individual who specifically claims such privilege.”

Defense Production Act of 1950, Title 50, U.S.C., App. §2155.

“(a) The President shall be entitled, while this Act [sections 2061-2166 of this Appendix] is in effect and for a period of two years thereafter, by regulation, subpoena, or otherwise, to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, and take the sworn testimony of, and administer oaths and affirmations to, any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act [said sections] and the regulations or order issued thereunder. * * *

“(b) No person shall be excused from complying with any requirements under this section or from attending and testifying or from producing books, papers, documents, and other evidence in obedience to a subpoena before any grand jury or in any court or administrative proceeding based upon or growing out of any alleged violation of this Act [sections 2061-2166 of this Appendix] on the ground that the

testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture;"

War and Defense Contract Acts of 1951, Title 50, App., U.S.C., §1152.

"(4) For the purpose of obtaining any information, verifying any report required, or making any investigation pursuant to paragraph (3) the President may administer oaths and affirmations, and may require by subpoena or otherwise the attendance and testimony of witnesses. * * * No person shall be excused from attending and testifying or from producing any books, records, or other documentary evidence or certified copies thereof or physical evidence in obedience to any such subpoena, or in any action or proceeding which may be instituted under this subsection, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;"

Second War Powers Act, Title 50, App., U.S.C., §643a.

"For the purpose of obtaining any information or making any inspection or audit pursuant to section 1301, any agency acting hereunder, or the Chairman of the War Production Board, as the case may be, may administer oaths and affirmations and may require by subpoena or otherwise the attendance and testimony of witnesses. * * * No person shall be excused from attending and testifying or from producing any books, records, or other documentary evidence or certified copies thereof or physical evidence in obedience to any such subpoena, or in any action or proceeding which may be instituted under this section, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;"

Investment Advisers Act, Title 15, U.S.C., §80-b-9.

“(d) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;”

Investment Companies Act, Title 15, U.S.C., §80a-41.

“(d) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpoena of the Commission, or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;”

Public Utility Holding Company Act, Title 15, U.S.C., §79r.

“(e) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;”

Securities Exchange Act, Title 15, U.S.C., §78u.

“(d) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other records and documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required by him may tend to incriminate him or subject him to a penalty or forfeiture;”

Shipping Act of 1916, Title 46, U.S.C., §827.

“No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence, in obedience to the subpoena of the Commission or of any court in any proceeding based upon or growing out of any alleged violation of this chapter;”

Narcotics Control Act, Title 18, U.S.C., §1406.

“Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—• • • is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify • • • But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor

shall testimony so compelled be used as evidence in any criminal proceeding . . . against him in any court.

Natural Gas Act, Title 15, U.S.C., §717m.

“(h) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;”

Federal Communications Act, 47 U.S.C., §409 (1):

“No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence.”

Opinion Below
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 388—October Term, 1956.

(Argued May 6-7, 1957.

Decided July 10, 1957.)

Docket No. 24626

UNITED STATES OF AMERICA,

Appellee,

v.

EMANUEL BROWN,

Defendant-Appellant.

Before—MEDINA, HINCKS and LUMBARD, *Circuit Judges.*

Emanuel Brown appeals from a sentence of 15 months imprisonment for contempt of court in refusing to answer questions propounded to him before a grand jury in the Southern District of New York in an investigation under the Motor Carrier Act, 49 U. S. C. A., §§301-327. The District Court ordered him to answer, ruling that thereby he received immunity from prosecution under 49 U. S. C. A. §305(d) and §46. Richard Levet, *Judge*. *Affirmed.*

PAUL W. WILLIAMS, United States Attorney,
Southern District of New York, New York,
N. Y. (Herbert M. Wachtell, Assistant United
States Attorney, of counsel), *for appellee.*

MYRON L. SHAPIRO, New York, N. Y., *for defend-
ant-appellant.*

LUMBARD, *Circuit Judge:*

Emanuel Brown appeals from a judgment of conviction and a sentence of 15 months imprisonment for refusing to answer questions before a grand jury which was investigating alleged violations of the Motor Carrier Act, 49 U. S. C. A. §§301-327 despite assurances that under the applicable provisions of law, 49 U. S. C. A. §§305(d), 46, he would be immune from prosecution regarding any matters concerning which he would be required to testify.

As Brown questions the propriety of the procedure resulting in the judgment, as well as the existence and extent of the immunity conferred and the severity of the sentence imposed, we first consider the sequence of events before the grand jury and the court.

On Friday, April 5, 1957, Brown was called before a grand jury which he attended pursuant to the command of a subpoena. This grand jury was conducting an investigation into an alleged violation of the Motor Carrier Act. Although advised by the Assistant United States Attorney that he could not be prosecuted on account of any matter concerning which he would testify under the Motor Carrier Act, Brown refused to answer these six questions:

"Q. Mr. Brown, are you associated with Young Tempo, Incorporated?

Q. Mr. Brown, does Young Tempo, Incorporated, use a trucking company known as the T and R

Cutting Company or as the T and R Trucking Company?

Q. Mr. Brown, who do you know to be the owner or owners or the principal in interest or principals in interest of the T and R Cutting or the T and R Trucking Company?

Q. Mr. Brown, are you associated with the Acme Dress Company in Midvale, New Jersey?

Q. Mr. Brown, does the T and R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?

Q. Mr. Brown, do you know if the T and R Trucking Company or the T and R Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey?"

Thereupon the grand jury attended before Judge Levett to seek his aid and assistance in a direction to Brown, who was present with his counsel, that he answer the questions. At the suggestion of the government the courtroom was cleared of all but the interested parties and court personnel, no objection being then made to this procedure.

At this first hearing, government counsel stated that Brown's testimony was sought because Young Tempo, Inc., a New York City dress manufacturing firm in which Brown was a principal, had used the T and R Trucking Company or the T and R Cutting Company for trucking. The government stated that its inquiry was directed to the true ownership of these trucking companies and their operation between New York and New Jersey, contrary to law, without a permit from the Interstate Commerce Commission.

Although Brown's counsel had been advised eleven days before, on March 25, that Brown was to be questioned on these matters under the Motor Carrier Act, he asked for a "reasonable adjournment" and notice of the specifications or charges in order to prepare for the hearing.

When the judge asked counsel what proof he might wish to present, counsel replied that he would like to look into the question of whether he could compel production of the minutes of prior grand jury investigations in which Brown had pleaded the Fifth Amendment.¹

Brown's counsel asserted the investigation was being used "as a means of circumventing the exercise by Brown of his Fifth Amendment privilege to refuse to testify before the other grand jury," which government counsel denied.² There followed a colloquy regarding the existence and scope of the immunity available to a grand jury witness under 49 U. S. C. A. §305(d) and §46, which we treat as the principal questions before us.

The grand jury reporter was then called as a witness and testified that Brown refused before the grand jury to answer each of the six questions on the ground that by answering he might tend to incriminate himself. A recess was taken until Monday afternoon, April 8.

On Monday, Brown and his counsel again appeared before Judge Levett. After the judge had indicated that he would instruct Brown to answer because the statute gave him full immunity, Brown's counsel asked for an adjournment of a day or so for further discussion with his client. The judge refused to allow more than half an hour and

1. These investigations related to the Victor Reisel acid blinding case, and to racketeering in the garment trucking industry.

2. Brown's counsel also stated that the Assistant United States Attorney had threatened Brown with indictment under the revenue laws. There is nothing in the record to substantiate this statement.

directed that the questions be answered before the grand jury at 2:45 P. M. After Brown's reappearance the grand jury returned to the courtroom at 3:15 P. M. and reported Brown's continued refusal to answer. The government then asked that the court again put the questions to Brown and suggested that Brown's persistent refusal in the physical presence of the court would justify his being summarily held in contempt under Rule 42(a) of the Federal Rules of Criminal Procedure.

Brown, who had already been sworn before the grand jury, was called to the stand by the district judge. His counsel objected to this procedure, apparently on the ground that Brown was now a defendant in a criminal contempt case, but this was overruled. The questions were again put by the court and Brown refused to answer each question on the ground that it might tend to incriminate him. After Brown's counsel again repeated his arguments why Brown should not be compelled to answer, the Court adjudged Brown to be in contempt, under 18 U. S. C. A. §401, and sentenced him to be confined for one year and three months.

1. *Immunity under the Motor Carrier Act.*

We start with the general proposition that where Congress has granted immunity from prosecution coextensive with the protection of the Fifth Amendment, the witness may not refuse to testify on the claim that he may incriminate himself. *Brown v. Walker*, 161 U. S. 591 (1896) decided that with respect to the same §46 here in question, then 27 Stat. 448, Act of February 11, 1893. *Ullman v. United States*, 350 U. S. 422 (1956) is the latest affirmation of this principle with respect to the Immunity Act of 1954.

Brown claims, however, that Congress did not intend to make the immunity provisions of §46 of the Interstate Commerce Act apply to grand jury investigations of alleged offenses under the Motor Carrier Act. We do not agree. We find that a reading of the applicable sections of the Interstate Commerce Act shows that Congress intended that witnesses testifying in a grand jury inquiry under those sections having to do with motor carriers would receive immunity just as if they were testifying in a grand jury inquiry under Title I.

The second clause of 49 U. S. C. A. §305(d) affords immunity in grand jury proceedings under the Motor Carrier provisions, Chapter 8, by incorporating, the "rights, privileges and immunities" and "the duties, liabilities, and penalties" of witnesses as stated in §46 of Title I.

Section 305(d)³ in its pertinent words provides:

"* * * and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, * * *"

3. Section 305(d) reads: "So far as may be necessary for the purposes of this chapter, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpoena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title; and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, unless otherwise provided in this chapter."

Section 46¹ provides in part:

“No person shall be excused from attending and testifying * * * in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify * * * in any such case or proceeding; * * *”

It seems to us that the natural meaning of the reference in §305(d) to §46 is that whatever is within the scope of the latter is to be incorporated into the former. Hence the immunity applies to grand jury investigations under Chapter 8, the Motor Carrier Act, just as it does to such investigations under Chapter 1.

Brown's argument is that since the first clause of §305(d) grants investigatory power only to the Commission, for “any matter under investigation,” the reference in the immunity clause of §305(d) to “any matter under investiga-

4. The full text of §46 is: “No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or

tion under this chapter" should be read *in pari materia* with the empowering clause to mean "under investigation under this chapter *by the Commission*." Consequently, §305(d) is limited to hearings before the Commission and does not apply to matters before grand juries and courts. We do not agree. It seems clear that if §46 applies at all it applies equally to "any cause or proceeding, criminal or otherwise." There is no qualifying language. On the contrary, §305(d) in plain words has made the immunity applicable to "*any matter under investigation under this chapter*." [Emphasis added.] This is not limited to any matter under investigation before the Commission. Furthermore, Chapter 8 provides in §322 for criminal prosecutions and penalties for the enforcement of its various provisions, 49 U. S. C. A. §§301-327. Thus the power to compel testimony is as natural to and as much wedded to Chapter 8 as it is to Chapter 1. Moreover, we are unable to see anything peculiar to motor carrier investigations which would justify a construction of the immunity provision narrower than that applicable to investigations relating to the other forms of transportation under the Interstate Commerce Act.

The language is clear, the construction for which the government contends is practical and sensible, and there is no reason why we should not construe the language

in any such case or proceeding; Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than \$100 nor more than \$5,000, or by imprisonment for not more than one year or by both such fine and imprisonment."

5. Congress has made grants of immunity applicable to grand jury proceedings under numerous statutes both before and after enactment of the Motor Carrier Act in 1935, among others: (1893) Interstate Commerce Act, now 49 U. S. C. A. §46; (1903) Anti-Trust Laws, 15 U. S. C. A. §32; (1916) Shipping Act, 46 U. S. C. A. §827; (1919) National Prohibition Act, 41 Stat. 317; (1934) Securities and Exchange Act, 15 U. S. C. A. §78u(d); 1934 Federal Communications Act, 47 U. S. C. A. §409(e); (1935) Industrial Alcohol Act, 26 U. S. C. A. §5315; (1935) Internal Revenue Act, 49 Stat. 875, now §5315, Internal Revenue Code of 1954, 26 U. S. C. A. §5315; (1937) Bituminous Coal Act, §8(b), 50 Stat. 87; (1938) Civil Aeronautics Act, 49 U. S. C. A. §644(i); (1940) Water Carriers Act, 49 U. S. C. A. §916(a); Freight Forwarders Act, 49 U. S. C. A. §1017(a); (1954) Immunity Act of 1954, 18 U. S. C. A. §3486(c); and (1956) Narcotics Control Act, 18 U. S. C. A. §1406.

according to its plain meaning.⁵ *United States v. Missouri Pacific R. R. Co.*, 278 U. S. 269, 278 (1929).

Brown's second argument is that even if §305(d) incorporates the immunity granted by §46, this is inadequate protection. He claims that it does not provide immunity for offenses not related to violations of the Motor Carrier Act because the immunity under §305(d) can be granted only "so far as may be necessary for the purposes of this chapter."

We do not believe the immunity is so limited. The statutory language does not imply that immunity is to be limited to offenses under the Motor Carrier Act; immunity for an offense under the revenue laws may be equally necessary "for the purposes of this chapter," precisely for the reasons suggested in this case. The scope of immunity must be as broad as the scope of incrimination, see *Counselman v. Hitchcock*, 142 U. S. 547 (1892), and we

5. Congress has made grants of immunity applicable to grand jury proceedings under numerous statutes both before and after enactment of the Motor Carrier Act in 1935, among others: (1893) Interstate Commerce Act, now 49 U. S. C. A. §46; (1903) Anti-Trust Laws, 15 U. S. C. A. §32; (1916) Shipping Act, 46 U. S. C. A. §827; (1919) National Prohibition Act, 41 Stat. 317; (1933) Securities Act of 1933, 15 U. S. C. A. §77v(c); (1934) Securities and Exchange Act, 15 U. S. C. A. §78u(d); (1934) Federal Communications Act, 47 U. S. C. A. §409(e); (1935) Industrial Alcohol Act, 26 U. S. C. A. §5315; (1935) Internal Revenue Act, 49 Stat. 875, now §5315, Internal Revenue Code of 1954, 26 U. S. C. A. §5315; (1935) Federal Power Act, 16 U. S. C. A. §825f(g); (1935) Public Utility Holding Company Act, 15 U. S. C. A. §79r(e); (1937) Bituminous Coal Act, §8(b), 50 Stat. §87; (1938) Civil Aeronautics Act, 49 U. S. C. A. §644(i); (1938) Natural Gas Act, 15 U. S. C. A. §717m(h); (1940) Investment Advisors Act, 15 U. S. C. A. §80b-9(d); (1940) Investment Companies Act, 15 U. S. C. A. §80a-41(d); (1940) Water Carriers Act, 49 U. S. C. A. §916(a); (1942) Second War Powers Act, 50 U. S. C. A. App. §643(a); (1942) Freight Forwarders Act, 49 U. S. C. A. §1017(a); (1954) Immunity Act of 1954, 18 U. S. C. A. §3486(c); and (1956) Narcotics Control Act, 18 U. S. C. A. §1406.

see no reason to think that any court will construe it more narrowly. Thus where Congress has said that the witness "shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, * * *" Congress has said that the witness cannot and will not incriminate himself by answering questions. This covers, and is meant to cover, everything which may be testified to, "any transaction, matter or thing." *United States v. Andolschek*, 142 F. 2d 503, 506 (2 Cir. 1944).

Should proceedings ever be brought against Brown regarding any transaction, matter or thing concerning which he testifies, he has a complete defense at that time. The immunity attaches with the testimony. *United States v. Monia*, 317 U. S. 424 (1943); *United States v. Andolschek*, *supra*. Even though the witness is already under indictment he must testify as he thereby is put beyond the reach of further prosecution. That much was decided by Judge Learned Hand in 1910 in *In re Kittle*, 180 Fed. 946, and this principle has never been questioned in any reported case. From this it follows that Brown has no right to remain silent because of some fancied prosecution which may never happen. It is enough for him to know that he is fully protected. The government has been empowered by Congress to pay the price of immunity for Brown's testimony. Should the need ever arise the courts will see to it that the bargain is fully kept.

Thus it follows that what may have happened when Brown testified before other grand juries is irrelevant in the light of the fact that he would receive immunity when he testified in the investigation under the Motor Carrier Act, and the district judge correctly refused to consider what Brown may have testified to previously or what may have transpired before those grand juries.

2. *The Validity of the Procedure.*

Brown further complains that in the District Court proceedings he was deprived of his rights to notice and a hearing under Rule 42(b) of the Federal Rules of Criminal Procedure, and that the fundamental safeguards due him in a criminal proceeding were not accorded. We disagree.

In cases where the witness is instructed by the Court and he refuses in the presence of the Court to comply with its order, we look to subsection (a) of Rule 42 which reads:

“(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.”

The Court having properly ruled that Brown must answer the questions, it was in order for the Court to require Brown to return to the grand jury and answer. When Brown persisted in his refusal to answer and repeated that refusal before the Court, Brown had disobeyed a lawful order of the Court, 18 U. S. C. A. §401(3) and as his disobedience and contempt of the Court's order had taken place in the “actual presence” of the Court, the judge was empowered under Rule 42(a) forthwith and summarily to punish Brown.

Brown and his counsel were afforded every reasonable opportunity to be heard regarding Brown's claim of privilege and the Court's proposed action thereon. While the issue had some novel aspects under the Interstate Commerce Act, counsel was advised of them well in advance of

the first hearing on April 5 when the questions were first put to Brown. At that time and thereafter on April 8 the judge afforded Brown and his counsel full opportunity to be heard. The procedure here followed is almost identical with that which was before us in *United States v. Gordon*, 236 F. 2d 916 (1956); *United States v. Courtney*, 236 F. 2d 921 (1956); *United States v. Curcio*, 234 F. 2d 470 (1956), reversed by the Supreme Court on other grounds, June 10, 1957; *United States v. Trock*, 232 F. 2d 839 (1956), reversed on other grounds 351 U. S. 976 (1956). See also *Carlson v. United States*, 209 F. 2d 209 (1 Cir. 1954).

The procedure which was followed here fully accorded to Brown all his rights under §42(a): he was given ample notice, he was represented by counsel and his counsel was fully heard.

There is good reason for providing for such summary procedure and for applying it to contumacious grand jury witnesses. The public interest requires that grand juries should suffer a minimum of delay in their investigations. Each delay of such an inquiry, however brief, multiplies the difficulties in getting facts, locating witnesses and finding the truth. Law enforcement faces enough difficulties without the added hazard of the unnecessary delays due to protracted hearings and adjournments which are not necessary. The district judge acted promptly and with commendable diligence. At the same time he afforded Brown and his counsel a full and adequate hearing at which all the points raised in this court, save one, were discussed.

The one point which was not raised below was the secrecy of the proceedings. Not having objected to the clearing of the courtroom at the time, we do not see how Brown can be heard to complain now. So long as the witness' counsel

was there to represent him and to make protest Brown has no standing to complain now. *In re Oliver*, 333 U. S. 257 (1948) is not in point as there the state judge, who was himself the one-man grand jury, forthwith convicted the petitioner in a secret session without any advance notice and without allowing him any time to consult counsel.

Finally Brown's contention that he was entitled to the right of a criminal defendant to refuse to answer any questions before the district judge is rejected. In the first place, this hearing before the district judge was, despite Brown's argument to the contrary, merely a proceeding ancillary to the grand jury investigation and not a criminal proceeding. In the second place, preventing the Court from inquiring of the witness whether he is willing to answer questions would frustrate the proper operations of the grand jury, and without affording the witness any protection which is not already accorded him. The Court is merely being advised as to what had already happened before the grand jury. Brown had already made it clear, both to the grand jury and the Court that he refused to answer. Had Brown remained mute and refused to speak at all, the result would have been the same.

Brown further complains that a sentence of 15 months constitutes cruel and unusual punishment in violation of the Eighth Amendment, or, in any event, an abuse of the Court's discretion. We find no merit to either of these contentions.

There is no statutory maximum which governs the power of the district court judges to sentence for contempt committed in their presence. Therefore unless the punishment offends the prohibition of the Eighth Amendment by reason of its cruel and unusual nature we must affirm the sentence imposed. For failure to produce books subpoenaed by a grand jury it has been held that 18

months imprisonment is not excessive. *Lopiparo v. United States*, 216 F. 2d 87, 92 (8 Cir. 1954), cert. denied 348 U. S. 916 (1955). We have heretofore sustained sentences up to three and four years where defendants have violated court orders to surrender, *United States v. Thompson*, 214 F. 2d 545 (2 Cir. 1954), cert. denied 348 U. S. 841 (1954); *United States v. Hall*, 198 F. 2d 726 (2 Cir. 1952), cert. denied 345 U. S. 905 (1953); and *United States v. Green*, 241 F. 2d 631 (2 Cir. 1957), cert. granted May , 1957.

That it has long been understood that the district courts have a considerable latitude in contempt sentences is further borne out by such cases as *Warring v. Huff*, 122 F. 2d 641 (D. C. Cir.), cert. denied 314 U. S. 678 (1941), two consecutive sentences of 13 months; *Conley v. United States*, 59 F. 2d 929 (8 Cir. 1932), two years; and *Hill v. United States*, 300 U. S. 105 (1937), concurrent sentences of a year and a day and two years. In view of these precedents it cannot be said that there was anything cruel or unusual about the sentence of 15 months which was imposed here.

Nor was the district court obliged to provide that the contemnor might purge himself. The judge fully considered whether he should so sentence Brown, and for good and sufficient reasons the sentence was unconditional. Indeed, we are not advised that Brown desires to purge himself.

There is no point in inquiring into whether the district judge meant the sentence to be coercive or punitive. The sentence was well within the power of the district court and that is the only question into which we may inquire.

The judgment is affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~92~~ H

EMANUEL BROWN,

Petitioner,

against

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

J. BERTRAM WEGMAN,

MYRON L. SHAPIRO,

Counsel for Petitioner,

60 Wall Street,

New York 5, N. Y.

Dated September 18, 1957.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1957

No. 356

EMANUEL BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

- A. Replying to Government's argument on the applicability of the purported immunity statute (Br. in opp., pp. 8-12).**

Arguing that the construction of Section 305(d), Motor Carriers Act, urged by petitioner (Pet., p. 35) is not justified, the Government refers (Br. in opp., pp. 10, 11) to the transient, curt legislative history of the section and the amendments to its two clauses.

These committee amendments were offered and adopted without explanation, discussion or debate. These amendments [both adopted simultaneously in time and as one

amendment to one section] contribute no clarification at all of the intent of Section 305(d) insofar as any applicability to a case such as at Bar is concerned.

In the first clause of Section 305(d) the donees of the powers granted are restricted by the language "the commission * * * and joint boards shall have the same power". The amendment to this clause did not limit or expand this grant.

Similarly, between the original text "as are provided in part I" and the adopted words, "as though such matter arose under part I" in the second clause, there is no apparent difference which could be said to bear upon this problem of construction. It is the repetition in the second clause of precisely the words: "any matter under investigation", not the language of the amendment, which confines the statutory proffer of immunity to those who are "subpoenaed or testifying" perforce before the Commission under its power given by the first clause to compel testimony.

At page 12 of its brief in opposition the Government argues that the "judicial gloss on Section 46 was carried forward in Section 305(d)" by the purported incorporation by reference. The "judicial gloss" is of no assistance in determining whether the inclusion in Section 46 of grand juries as bodies able to grant immunity was carried over into Section 305(d). *Shapiro v. United States*, (335 U. S. 1, 20) cited by the Government involved the Price Control Act which incorporated Section 46 by reference, but of significance here is that that immunity provision by the terms of its incorporation was limited to the Price Administrator and did not extend to grand juries (Pet. 19, 45, 46). The question involved here was not raised nor considered in the *Shapiro* case.

Nor does this case raise the question of the scope of the grand jury's power to investigate, as implied by the Government (Br. in opp., p. 10); it does put forward the issue of that body's power to grant immunity under a statute such as Section 305(d)—since the grand jury has no inherent power to grant immunity; such power exists only when specifically granted.

B. Replying to subdivision 2 of petitioner's argument as to the adequacy of the immunity (Br. in opp., pp. 12, 13).

Petitioner in subdivision 1 of the argument in his petition for certiorari argues (pp. 21-23) that the language at the very commencement of Section 305(d), "so far as may be necessary for the purposes of this chapter", limits the immunity purportedly granted and makes it inadequate as a substitute for the privilege enshrined in the Constitution.

The Government in its brief in opposition, at page 12, proceeds to answer as though petitioner had argued that the phrase "in connection with any matter under investigation under this chapter" limited the immunity to offenses arising under the chapter.

But that was not petitioner's point, and no answer is suggested by the Government to the argument actually made.

C. Replying to the Government's argument on the propriety of the contempt procedures followed below (Br. in opp., pp. 13-16).

The Government considers that the district judge, on the occasion of the second refusal by a grand jury witness to answer questions theretofore ordered to be answered, may either direct that he be prosecuted on notice under

Rule 42(b), F. R. Crim. P., or exercise an ancillary power in aid of the grand jury" to make a further order to the witness in open court and before the grand jury to answer questions. The Government says that, if the district court elects the latter procedure and the witness then refuses and states that he will persist in his refusal, the Court may treat this disobedience to the final order in the presence of the Court as a contempt under Rule 42(a).

But the first method of procedure outlined by the Government is the only proper mode which can comply with Due Process and preserve the witness's rights. The other method is inconsistent and in conflict with Mr. Justice Harlan's statement in *Ex Parte Savin*, 131 U. S. 267, 277 of the principles involved here (quoted by petitioner in his petition at page 30); and reaffirmed by Chief Justice Taft in *United States v. Cooke*, 267 U. S. 517 (cited by the Government in its brief in opposition at p. 15) at pages 535-537.

In the *Cooke* case, Chief Justice Taft said at page 536:

"When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument"

In the footnote on page 15 of its brief in opposition, the Government attempts to argue that *Carlson v. United States*, 209 F. 2d 209 (C.A. 1) and *Wong Gim Ying v. United States*, 231 F. 2d 776 (C.A., D.C.) are distinguishable, and states that it is not suggested in either case "that, after an initial disobedience to the Court's order to return to the grand jury room and answer the questions, the Court cannot order the witness to answer the questions in open court in the presence of the grand jury

and summarily hold him in contempt on his refusal to obey such final order."

The *Wong Gim Ying* case, *supra*, not only suggests, but clearly states what is to happen if a witness has been returned to the grand jury room and has again improperly refused to answer the specific questions as directed by the judge.

Judge Danaher said at page 780:

"Had she been so directed, and had she then improperly refused to answer the specific questions pursuant to the judge's ruling that her self-incrimination claim lacked foundation, the next step would have called for prosecution on notice. In that circumstance, she would have received the protection of Rule 42(b).

"The 'failing to testify before the grand jury, as directed' obviously did not occur in the presence of the District judge. He did not see or hear the conduct constituting the contempt. Thus the adoption of the Rule 42(a) procedure was invalid, and it is clear that the requirements of Rule 42(b) were not complied with".

In conclusion, Judge Danaher said at page 780:

"We will, therefore, remand this case with directions that the Government, if it elects to proceed with this appellant as a witness, accord to her full protection to which she is entitled."

This is the procedure followed in the United States District Court for the District of Columbia,—see *Powell v. U. S.*, 226 F. 2d 269 and *Traub v. U. S.*, 232 F. 2d 43— and in other circuits—see *Camarota v. U. S.*, 111 F. 2d 243 (C.A. 3). Cf: *Paul v. U. S.*, 36 F. 2d 639 (C.A. 9).

In *Carlson v. U. S.*, 209 F. 2d 209 (C.A. 1), also attempted to be distinguished by the Government in its footnote on page 15 of its brief in opposition, the Court specifically directed itself to the situation involved here, as pointed out at page 27 of the petition, and held that the proceedings must be under Rule 42(b).

The Government also refers to *Hale v. Henkel*, 201 U. S. 43, where, however, the criminal contempt proceeding was instituted on presentment and not in the fashion here followed. In *U. S. v. Weinberg*, 65 F. 2d 394 (C.A. 2), cited by the Government, it appears that the criminal contempt there was prosecuted on a grand jury presentment.

The Government also refers to *U. S. v. Curcio*, 234 F. 2d 470 (C.A. 2) which was reversed by this Court, 354 U. S. 118, on the Fifth Amendment questions presented, rather than on the issue as to the propriety of the procedure, which was similar to that in this case. It cannot be argued by the Government that, by reversing in *Curcio* and affirming in *U. S. v. Rogers*, 340 U. S. 367, on the Fifth Amendment questions presented, this Court approved the procedure followed here. It appears also that the Government in *Curcio* (No. 260, October Term, 1956, Br. in opp. to pet. for cert., pp. 16, 17 and fn. 6) advanced a similar contention as to the effect of *U. S. v. Rogers, supra* (See Br. in opp. here, p. 13, fn. 4); this Court nevertheless granted certiorari.

With respect to the question as to whether the District Court could compel petitioner to take the stand, the Government's position is contradictory. In support of the summary proceedings under Rule 42(a) followed here, the Government argues that petitioner had ample opportunity to defend himself at every stage, but then it says that petitioner "was not therefore in the status of a defendant until he had again refused to give the answer demanded" (Br. in opp., p. 16).

The Government thus seeks to create a peculiar and anomalous sport in criminal procedure, one ingeniously devised to avoid the constitutional rights of defendants charged with criminal contempts. The grand jury witness, according to the Government, is not a defendant until he, having once more been recalcitrant before a grand jury, despite the Court's direction to answer, commits by repetition under the compulsion of a direct order of the Court, the same contempt before the Court, as before the grand jury, which *instantly* eliminates his right to notice and hearing and all other rights of a criminal defendant; and, thus, only then does he become a defendant, but bereft of all rights, and can be convicted summarily for acts which he could not be compelled by the Court to do, if he were treated as a defendant immediately upon his second return to the Court by the grand jury. Cf: *Matusow v. U. S.*, 229 F.2d 335, 346, 347 (C.A. 5). Due process is not merely eroded by this device; it is obliterated.

It is defiant of reason to argue that petitioner was not a defendant until on his second return to the court room he refused to answer the questions put by Judge Levet. He was returned to the court room because of his then recalcitrance and the Government, knowing of his persistence in his refusal to answer after a specific direction had already been given by the Court, said in effect (47A; 48A), "Put him on the stand; ask him the questions and, if he again refuses to answer, hold him in 'summary contempt under Rule 42(a)' [47A, 48A]". Petitioner was, however, then and there in jeopardy—the objective was his conviction of a crime, inevitably and inexorably. How can it be said that his fundamental rights when in jeopardy in a criminal proceeding did not attach and protect him?

Consider also that the Government by supporting the device here used is conceding, in effect, that, at the point where the Court was about to ask the petitioner whether, if returned to the grand jury room, he would answer the questions, petitioner had acquired the status of a defendant in a criminal proceeding. It follows automatically that this critical question (57A), whether he would answer, if sent back to the grand jury room, could not even then be asked of him by the judge, as petitioner was then being compelled, although a defendant in a criminal proceeding, to testify, when he had an absolute right not to take the stand or testify.

Of course, the fact is that petitioner's right not to take the stand attached from the moment that he was returned to the courtroom for the second time by the grand jury, but even the concession here made by the Government voids his conviction.*

D. Replying to the Government's argument on the question of the sentence (Br. in opp., pp. 16-18).

To demonstrate that the sentence was not extraordinary in severity, the Government refers to certain cases, none of which is comparable to the instant case.

* In footnote 6 at page 16 of its brief in opposition, the Government deals with the question of the secrecy of the proceedings (Pet., p. 3). Implicit in its discussion is the contention that the proceedings on April 8, 1957 were open. While the record does not show that the courtroom was cleared on that day by the Court (46A, 47A), that it was, cannot factually be disputed and the Court of Appeals assumed such fact (Pet., pp. 64, 65). It should be noted also that the prosecutor on April 5, 1957 said to the Court (7A), that it is the procedure that the courtroom be cleared.

The right to a public trial being so fundamental, the infringement thereof cannot, it is respectfully submitted, be overlooked on appeal or in this Court, because of counsel's failure to raise it in the trial court.

In *Hill v. United States, ex rel. Weiner*, 300 U. S. 105, the contempt involved was the violation of a decree in an anti-trust suit. In *Lopiparo v. United States*, 216 F. 2d 87 there was involved the credibility and good faith of a witness who testified that he was unable to find certain books he was ordered to produce. *Warring v. Huff*, 122 F. 2d 641 concerned, as shown by the companion case *Warring v. Colpoys*, 122 F. 2d 642, the use of money to influence a prospective juror. *Conley v. United States*, 59 F. 2d 929 arose out of an attempt to "fix" a criminal case and to procure its dismissal for a consideration. *United States v. Lederer*, 140 F. 2d 136 was a violation of an injunction restraining the defendant from selling meat at prices in excess of the O.P.A. maximum price regulation. *Creekmore v. United States*, 237 F. 743 involved an attempt to corrupt a trial juror.

The Government's position that, although certiorari has been granted in *United States v. Green* on the question of validity of a sentence in excess of one year for criminal contempt, it should not be allowed here on the same question, is manifestly unfair. Cf: *Costello v. U. S.*, Oct., 1956 Term, No. 666, 1 L. ed. 2d 591. As there are other questions in the *Green* case, on which this Court might very well decide that case, petitioner would thereby be deprived of his right to be heard on that point in this Court.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, a writ of certiorari should be allowed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1957

No. [REDACTED]

EMANUEL BROWN,
Petitioner,
against

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1957

No. 356

EMANUEL BROWN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

Certiorari has been granted to review petitioner's conviction for criminal contempt in refusing to answer certain questions in a grand jury inquiry. Petitioner was sentenced to fifteen (15) months imprisonment. On appeal the Court of Appeals for the Second Circuit affirmed.

Opinion Below

The opinion of the Court of Appeals (R. 52) is printed at 247 F. 2d 332. The District Court's opinion (R. 34) is not officially printed.

Jurisdiction

The judgment (R. 64) of the Court below was dated and entered on July 10, 1957. Jurisdiction to review such

judgment by certiorari is conferred on this Court by §1254, Title 28, U.S.C. and is invoked pursuant thereto and Rule 37(b), Federal Rules of Criminal Procedure.

Questions Presented for Review

1. Whether pursuant to §305(d), Motor Carriers Act (49 U.S.C.) [*infra*, p. 33], a witness in a grand jury inquiry into alleged offenses under §322 [*infra*, p. 41] of that Act obtains immunity from prosecution for any transaction or offense concerning which he under compulsion may there testify or produce evidence.

a. Whether Congress in enacting §305(d), *supra*, intended to make the immunity provisions of §46, Interstate Commerce Act (Title 49, U.S.C.) [*infra*, p. 33], applicable to grand jury investigations under the Motor Carriers Act.

b. Whether, assuming *arguendo*, that some immunity was conferred upon petitioner by §305(d), *supra*, it is co-extensive with his privilege against self-incrimination and, therefore, constitutionally sufficient to eliminate that privilege.

2. Whether the procedure which resulted in petitioner's conviction of criminal contempt, pursuant to subdivision (a) of Rule 42, Federal Rules of Criminal Procedure [*infra*, p. 37], for refusing in the presence of the Court and the grand jury to answer certain questions previously put to him before the grand jury, was valid and proper.

a. Whether petitioner after the direction of the District Court to answer certain questions had re-

appeared before the grand jury and refused again to answer the questions, was entitled, under subdivision (b) [*infra*, p. 37] of Rule 42, Federal Rules of Criminal Procedure, the requirements of Due Process and the fundamental fairness requisite in Federal criminal proceedings, to notice, reasonable time for preparation and a statement of the criminal contempt charged.

b. Whether, after petitioner returned to the grand jury pursuant to the District Court's order and refused again to answer the questions directed to be answered and was once more brought before the Court, the Court could validly ignore Rule 42(b) [*infra*, p. 37] Federal Rules of Criminal Procedure and refuse to afford petitioner notice, specification of charges, and reasonable time for preparation and compel petitioner to take the stand and testify and, upon petitioner's refusal to answer and his statement that he would refuse again to answer, if returned to the grand jury, convict petitioner of criminal contempt pursuant to Rule 42(a) [*infra*, p. 37] as for a contempt committed in the presence of the Court.

c. Whether the secrecy of the proceedings violated the requirement that a contempt judgment be public.

3. Whether the sentence of fifteen months imposed upon petitioner constituted cruel and unusual punishment or an abuse of the District Court's discretion.

Whether in this criminal contempt proceeding the Court could impose a coercive sentence.

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions, statutes and regulations involved, are set forth in the appendix to this brief. Their citations follow: *United States Constitution*, Amendments V, VI, VIII [*infra*, p. 42]; *Motor Carriers Act*, Title 49, U.S.C., §§305(d) [*infra*, p. 33], 322 [*infra*, p. 41]; *Interstate Commerce Act*, Title 49, U.S.C. §46 [*infra*, p. 33]; *Federal Rules of Criminal Procedure*, Rules 42(a), 42(b) [*infra*, p. 37].

Statement of the Case

Petitioner is a principal of Young Tempo, Inc., a New York City dress manufacturer (R. 8). T. and R. Trucking Company has transported dresses for Young Tempo, Inc. and Acme Dress Company between New York and Midvale, New Jersey (R. 8, 9). The actual owner of the trucker (according to the Government's information) is John Dioguardi, although Theodore Rij is the nominal proprietor (R. 9).

Active in the Southern District of New York are grand juries conducting a general racketeering investigation and an inquiry into the Victor Riesel obstruction of justice case (R. 46, 47). The subjects of these investigations are Dioguardi, Rij (also known as Ray) and possibly others (R. 47). The Government here and in the other investigations sought to show petitioner's associations with these persons (R. 47).

Prior to this matter petitioner pursuant to subpoena appeared at least eleven times before two of these other grand juries (R. 10, 26). Petitioner's first appearance related to the Riesel obstruction of justice case and the

location of Rij (R. 26). Petitioner's subsequent appearances were before a jury investigating alleged garment trucking racketeering (R. 26).

At the time hereof, petitioner was still subject to the earlier subpoenas (R. 26), his further appearance thereunder having been adjourned.

Before the other juries, petitioner mainly claimed his privilege against self-incrimination, but, concededly, his testimony there "went part way into the area" with which the instant proceedings are concerned (R. 27, 28).

Before the other grand juries, petitioner, and business associates were told by the same prosecutor as here that petitioner was to be indicted for violation of the Internal Revenue laws (R. 28).

In March 1957, petitioner's counsel was told by this prosecutor that an investigation under the Interstate Commerce Act was about to be instituted, that petitioner would be subpoenaed to appear before the Grand Jury, that the immunity provision contained in §46, Title 49, U.S.C. [*infra*, p. 33], would apply and that the Fifth Amendment plea could not be interposed (R. 9, 10).

Thereafter petitioner appeared before the April, 1957 grand jury pursuant to a subpoena requiring him to appear and "testify . . . in regard to an alleged violation of Sections 309, 322, Title 49 United States Code" (R. 17-19). Petitioner's counsel was present in the anteroom of the Grand Jury room. Petitioner was advised that "the foreman . . . will . . . allow you to consult with your attorney if you feel you desire to do so" (R. 17-19).

Petitioner was asked (R. 19): "Mr. Brown, are you associated with Young Tempo, Incorporated?"

Petitioner received permission to speak with his attorney (R. 19). After such consultation, petitioner returned

to the grand jury and the question was read to him again. He refused to answer because of possible self-incrimination (R. 19).

The prosecutor then advised (R. 19; 20) petitioner "that this Grand Jury is conducting an investigation for possible violations of the Interstate Commerce laws, * * * and that under Title 49 United States Code, Section 305(d), the Congress * * * has provided that any witness * * * compelled to give testimony as to any matter arising under the Motor Carrier Section * * * shall by virtue of his testimony be given immunity from federal prosecution as to any crime which might arise out of the subject matter of his testimony" and that he did "not have any privilege to plead the Fifth Amendment as to the questions which are going to be put to" him before this Grand Jury.

Petitioner conferred again with counsel, returned to the grand jury room and refused once more to answer the question on the ground of possible self-incrimination (R. 20, 21). Petitioner was then informed (R. 21) that, if he did not answer this question, he could "be brought before a Judge of this Court and directed to answer this and other questions". Once more petitioner consulted with counsel, the same question was again put to him and he refused to answer on the ground of possible self-incrimination (R. 21, 22).

Thereafter five more questions were asked of petitioner before the grand jury. Petitioner refused to answer all on the ground of possible self-incrimination (R. 22, 23).

The questions which petitioner refused to answer are:
 1. Mr. Brown, are you associated with Young Tempo, Incorporated (R. 21)? 2. Mr. Brown, does Young Tempo, Incorporated, use a trucking company known as the T &

R Cutting Company or as the T & R Trucking Company (R. 22)? 3. Mr. Brown, who do you know to be the owner or owners or the principal in interest or principals in interest of the T & R Cutting or the T & R Trucking Company (R. 22)? 4. Mr. Brown, are you associated with the Acme Dress Company, in Midvale, New Jersey (R. 22)? 5. Mr. Brown, does the T & R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey (R. 23)? 6. Mr. Brown, do you know if the T & R Trucking Company or the T & R Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey (R. 23)?

After petitioner's refusal to answer these questions, the grand jury, the prosecutor, petitioner and counsel proceeded to District Judge Levet's courtroom.

At the Court's request, the prosecutor outlined the procedure requested by the Government to be followed (R. 6-8). The courtroom was cleared (R. 6) and the proceedings throughout were private.

The prosecutor stated that the grand jury requested the Court's aid and assistance in a direction to petitioner to answer the questions (R. 6-8).

Outlining the procedure requested, the prosecutor stated that at the termination of that hearing "if the Court determines that the witness in fact must answer the questions, that the Court direct him to answer the questions" and that "at that point it would be the Government's intention to have the Grand Jury and the witness return to the grand jury room, at which point the same questions would be put to the witness" (R. 7, 8).

Upon further refusal by petitioner to answer on his return to the grand jury room, the prosecutor said (R. 8), petitioner would be returned to the Court with a second request that the same questions be put to him and, if he then refused to answer, "the Government would ask that he be held summarily in contempt according to the procedure of Rule 42(a) * * *, and for a violation of Section 401, Subdivision 3 (18 U.S.C.) which makes punishable as contempt the disobedience of a lawful order of the Court."

The prosecutor also stated (R. 8, 9) the general nature of the inquiry to be "that contrary to the law this T & R Trucking Company neither applied for nor received a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey."

At this point petitioner's counsel reminded (R. 9) the Court that in his off-the-record discussion of procedure the prosecutor had said "that the Government's position was that this was the only hearing" petitioner was "entitled to", and applied for a reasonable adjournment and "a notice from the Government of the specifications or charges for which we are having this hearing so that we can prepare for this hearing and be able to properly represent our client", which requests were denied. The existence of issues of fact was indicated to the Court by petitioner's counsel (R. 10, 11).

After argument (R. 11-17) on the applicability of the immunity sections of the Motor Carriers Act, §305(d) [*infra*, p. 33], the Government called (R. 17) the grand jury stenographer as a witness. She read her untranscribed minutes of the grand jury proceedings (R. 17-23). When she finished, an adjournment was requested by petitioner's attorney, but was not granted (R. 24).

Argument was then had on the issues raised by petitioner's appearance before other Grand Juries, and on other issues involved and on the incriminatory nature of the questions put to petitioner (R. 25-34).

This part of the proceedings occurred on Friday, April 5th, 1957. The Court directed the parties to return on Monday, April 8th, at 2:00 P.M. (R. 34).

On April 8th, the Court (R. 34, 35) " * * * determined that the witness must testify as to the questions * * * propounded * * * that * * * Sections 305(d), Title 49 and Section 46 of Title 49 adequately provide for immunity in the instances involved * * * that the immunity applies to a grand jury * * * that the immunity applies in the State Courts * * * " and that the "immunity exists even though no privilege is claimed * * * and under the Rules of Criminal Procedure * * * the witness must answer * * * ".

The Court also said (R. 36): "I do not think the fact that this witness has testified before other grand juries affects this situation * * * He is immune from prosecution for all matters on which he is questioned before this grand jury * * * ".

The Court then directed the grand jury to retire (R. 35, 36). Counsel for petitioner requested an adjournment to consult with his client (R. 35). A postponement for thirty minutes was granted (R. 35).

Petitioner, pursuant to the Court's direction, returned to the grand jury room and the six questions ordered to be answered were again put to him (R. 37-39).

Petitioner refused to answer on the ground of possible self-incrimination (R. 38, 39). The grand jury, petitioner and all counsel then proceeded again to Judge Levet's courtroom (R. 36, 37).

At that time the prosecutor stated to the Judge that the grand jury "again wishes to request the aid and assistance of the Court with reference to" petitioner (R. 36). Discussion was then had again as to the nature of this proceeding (R. 36, 37).

The prosecutor said: "At this point the grand jury is still merely requesting the assistance of the Court. What the Government would request is that if it appears, * * * that the witness is persisting in his refusal * * * the Court itself, in the presence of the grand jury, will put the six questions to the witness and ask him, first, whether he is willing to answer them now, and, second, would he answer them if he were sent back to the grand jury again. And if the witness again refuses here and now in the physical presence of the Court or persists in his refusal to answer, that the witness be held in summary contempt under Rule 42(a) [*infra*, p. 37] of the Federal Rules of Criminal Procedure" (R. 36, 37).

And the Court stated "That is what I propose" (R. 37).

Petitioner's counsel excepted to this procedure and requested compliance with Rule 42(b) [*infra*, p. 37], notice of the charges and specifications and an opportunity for a full hearing (R. 37). The public was excluded.

This request and objection were overruled (R. 37). The grand jury stenographer was then called and read his untranscribed minutes which disclosed petitioner's refusal before the jury to answer the questions set forth above because of possible self-incrimination (R. 37-39).

The Court, over objection and exception, directed petitioner to take the stand in the courtroom (R. 40).

Petitioner's counsel also objected on the ground that petitioner was being compelled in a criminal cause to be a witness against himself, which objection was overruled (R. 40).

The Court did not swear petitioner, but deemed him to be under oath, since he had been sworn before the grand jury. The Court's theory was that this was "a continuance of the Grand Jury proceeding before the Court". Petitioner's counsel took further exception and objection to this proceeding (R. 40).

The Court then put to petitioner the same six questions. Petitioner's counsel made specific objection to each question. Petitioner refused to answer each question on the ground of possible self-incrimination (R. 41, 42).

The Court, repeating each question directed the petitioner to answer, which interrogation and directions were done over the objection of petitioner's counsel (R. 43, 44). To each question and direction petitioner maintained his refusal to answer on the ground of possible self-incrimination (R. 43, 44).

At the Government's request the Court, over objection, then asked petitioner "whether he would maintain his refusal to answer, if he returned to the grand jury room", to which petitioner answered in the affirmative (R. 44).

Petitioner was then asked, over counsel's objection, whether he believed that these answers would incriminate him in any way and petitioner refused to answer (R. 44, 45).

The Court then stated that by reason of petitioner's "refusal to answer in the actual presence of this Court, I am forced to act upon this matter". Petitioner's counsel objected to the whole proceeding and again asked for notice and specifications and an opportunity to be heard, which objection and request were overruled (R. 45).

a. The Court of Appeals (R. 62) considered that it was "merely a proceeding ancillary to the grand jury investigation and not a criminal proceeding".

The Court then permitted counsel to argue as to why an adjudication of contempt should not be made (R. 46, 47).

Petitioner's counsel argued, *inter alia*, that the purported immunity did not exist, that petitioner should have a full hearing on the issues of fact involved herein, that the whole procedure was bad and objectionable on the ground that, irrespective of the question of immunity, petitioner's constitutional rights in a criminal cause were seriously infringed by his being compelled to take the stand and being sworn and being asked questions, that in this proceeding, entirely separate and apart from the grand jury proceedings, it was wrong to ask petitioner whether he believed that answering the questions would incriminate him and that the failure to give petitioner notice and an opportunity to defend was in violation of due process and of petitioner's rights under the Constitution and that the proceeding was being used by the United States Attorney as a device or subterfuge or artifice to circumvent petitioner's constitutional rights (R. 46, 47).

The Court nonetheless adjudicated petitioner in contempt (R. 47).

Government counsel was then heard by the Court on the question of sentence and in that regard he said, among other things, the following (R. 47-49):

"For these reasons * * *, the Government here would ask for a substantial sentence, and that is done not so much for any punitive effect as it would be for the coercive effect of the sentence.

Under the statute there is no maximum penalty upon the sentence that your Honor may impose. The only maximum is that imposed by the Constitution against cruel and unusual punishment.

I would further ask * * * that * * * your Honor not include a purge clause. * * *"

Following this request by the United States Attorney for a coercive sentence, the Court sentenced petitioner to be confined for a period of one year and three months (R. 49).

ARGUMENT

POINT I

Congress in §305(d), Motor Carriers Act did not intend to make the immunity provisions of §46, Interstate Commerce Act, applicable to Grand Jury investigations of offenses under the Motor Carriers Act. Consequently Petitioner could not receive immunity and was entitled to refuse to answer the questions because of possible self-incrimination.

The subpoena served upon petitioner directed him to appear before the April Grand Jury to testify in an investigation of possible violations of §§309 and 322 [*infra*, p. 41] of the Motor Carriers Act.

On his appearance before the Grand Jury and before the Court, petitioner refused to answer certain concededly incriminatory questions on the ground that the answers might tend to incriminate him.

Consequently we have here a valid claim of privilege, except for the claimed applicability of an immunity provision.

The Motor Carriers Act does not have a separate immunity provision. Congress in §305(d) [*infra*, p. 33] incorporated by reference the immunity provision contained in §46 [*infra*, p. 33] of the Interstate Commerce Act.

To determine whether a witness may obtain immunity before a specific body, it is necessary always to ascertain whether the particular immunity statute by its terms applies to that tribunal or officer—here a grand jury.¹

The statute here involved §305(d) [*infra*, p. 33], Motor Carriers Act, first provides for the Commission's power to administer the Act and to require by subpoena the attendance and testimony of witnesses and the production of books and documents and to take testimony by deposition.

This grant of power contained in the first clause of §305(d) is then modified by the language "relating to any matter under investigation, as the commission has in a matter arising under Chapter 1 of this title [Title 49, U.S.C.]."

Following this modifying phrase is a semi-colon and a second clause is then set forth which reads "and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same . . . immunities . . . as though such matter arose under Chapter 1 of this title, unless otherwise provided in this chapter."

In statutory construction, this Court has held, "punctuation marks are no part of an act" and "to determine the intent of the law, the court . . . will disregard the punctuation" (*U. S. v. Shreveport Grain & E. Co.*, 287 U. S. 77, 82, 83). Consequently, the whole of §305(d) [*infra*, p. 33] must be read together.

1. See *Blaine v. United States*, 29 F. 2d 651 (C.A. 5); *Matter of Doyle*, 257 N.Y. 244; *State v. Nolan*, 231 Minn., 522, 44 N.W. 2d 66; *State v. Gensmer*, 235 Minn. 72, 51 N.W. 2d 680; *Koonck v. Cooney*, 244 Iowa 153, 55 N.W. 2d 268; *Ex parte Andrews*, 51 Tex. Cr. R. 79, 100 S.W. 376. See also *Hebebrand v. State*, 129 Ohio St. 574, 196 N.E. 412.

When read together the whole sentence of §305(d) shows that Congress was concerned with and describing the powers of the Commission to obtain testimony and evidence for its enforcement and administration of the Motor Carriers Act, and that it intended to give as broad as possible scope to the Commission's investigatory powers, but no more.

In the first clause of §305(d) the Commission's power to take testimony and to compel the production of papers relates "to any matter under investigation". Then in the second clause the grant of immunity is limited to "any person subpoenaed or testifying in connection with any matter under investigation under this chapter." Necessarily the re-use of the words "in connection with any matter under investigation under this chapter" discloses an intent by Congress to relate back to the prior use of the words "any matter under investigation" in the first clause of §305(d) and, therefore, to limit the immunity to the Commission's investigations and not to extend the immunity to investigations by grand jury or other bodies.

It is a necessary implication in the second clause of §305(d) after the phrase "any matter under investigation" that the words "by the Commission" be inserted. Congress having used these words before in the same sentence and having limited those provisions to the Commission, obviously, as a matter of draftsmanship, did not deem it necessary to repeat the words "by the Commission"; as ordinary rules of statutory construction would necessarily require their implication.

The language of §305(d) in effect displaced and excised from §46 [*infra*, p. 33] of the Interstate Commerce Act as made applicable to the Motor Carriers Act the words "testifying * * * in any cause or proceed-

ing criminal or otherwise based upon, or growing out of any alleged violation of Chapter 1". Congress thereby eliminated the grand jury as a body before whom immunity could be obtained in an investigation under the Motor Carriers Act.

If Congress had intended the immunity to extend to grand jury proceedings and proceedings other than the Commission it certainly knew "the phraseology necessary to reach this result" *Matter of Doyle*, 257 N.Y. 244, 268, 269).

The words of art necessary and most often used for the purpose of extending the immunity to grand jury or court proceedings are "in any proceeding" or "in any suit or proceeding" or "in any cause or proceeding, criminal or otherwise" or "in any action or proceeding" or "in any cause of proceeding instituted by the Commission" or "in any proceeding, suit or prosecution". See *Federal Communications Act*, Title 47, U.S.C., §409(l) [*infra*, p. 50]; *Civil Aeronautics Act*, Title 49, U.S.C., §644(i) [*infra*, p. 45]; *Second War Powers Act* (1946), Title 50 U.S.C., App. §643a [*infra*, p. 47]; *War and Defense Contracts Acts* (1946), Title 50 U.S.C., App., §1152(a)(4) [*infra*, p. 47]; *Shipping Act of 1916*, Title 46, U.S.C., §827 [*infra*, p. 49]; *Industrial Alcohol Act*, Title 26, U.S.C. (1946 ed.), §3119, now §5315, Title 26, U.S.C. [*infra*, p. 45]; *Securities Act of 1933*, Title 15, U.S.C., §77v(c) [*infra*, p. 35]; *Securities Exchange Act*, Title 15, U.S.C., §78u(d) [*infra*, p. 49]; *Public Utility Holding Company Act*, Title 15, U.S.C., §79r(e) [*infra*, p. 48]; *Natural Gas Act*, Title 15, U.S.C., §717m(h) [*infra*, p. 50]; *Investment Advisers Act*, Title 15, U.S.C., §80b-9(d) [*infra*, p. 47]; *Investment Companies Act*, Title 15, U.S.C., §80a-41(d) [*infra*, p. 48].

Actually, the inclusion of the words "before the Commission" is not necessary to limit immunity to testimony before the Commission, but the use of the phraseology "in any cause or proceeding" or other similar language is required to extend the immunity power to grand juries or court proceedings; these words or words of similar import having been held by this Court in *Hale v. Henkel*, 201 U. S. 43, 66 (1906), to extend immunity to grand jury and court proceedings.

Here the use in §305(d), Motor Carriers Act, of the language "testifying in connection with any matter under investigation under this chapter" operated to delete the language "any cause or proceeding, criminal or otherwise" from §46 as incorporated into §305(d) and prevented the immunity provisions from extending to grand jury proceedings.

The enactment by Congress of an immunity provision limited to proceedings by a Commission and insufficient to extend to Grand Jury investigations, is not novel. See *Federal Trade Commission Act*, Title 15, U.S.C.A., Ch. 2, §49 [*infra*, p. 34]; *Taft-Hartley Act*, Title 29, U.S.C., §161 (3) [*infra*, p. 36]; *Merchant Marine Act*, 1936, Title 46, U.S.C., §1124(c) [*infra*, p. 35]; *Perishable Commodities Act*, Title 7, U.S.C., §499m(f) [*infra*, p. 36]; *China Trade Act*, Title 15, U.S.C., §155(a), (c) [*infra*, p. 38]; *Atomic Energy Act*, Title 42, U.S.C., §2201(c) [*infra*, p. 39]; and the *Social Security Act*, Title 42, U.S.C., §405(d), (f) [*infra*, p. 39].

It should be noted that §305(d), Motor Carriers Act, is not alone in incorporating by reference §46 of the Interstate Commerce Act and not extending the immunity power beyond the particular administrative officer or board involved. See *Commodity Exchange Act*,

Title 7, U.S.C. (1946 ed.), §15 [*infra*, p. 42]; *Emergency Price Control Act*, 56 Stat. 30 (1942), §202 [*infra*, p. 43]; and the *Rent Control Act*, Title 50, App., U.S.C., §1896 (f) (1), (3), (6) [*infra*, p. 40]. See also *Export Controls Act*, Title 50, U.S.C., App., §2026(a), (b) [*infra*, p. 45].²

Illustrative of the converse of the situation confronting the petitioner here is *Blaine v. United States*, 29 F. 2d 651 (C.A., 5). *The National Prohibition Act* provided in §47, 27 U.S.C.A. (1927 ed.) that "no person shall be excused, on the ground that it may tend to incriminate him * * * from * * * testifying * * * in obedience to a subpoena of any court in any suit or proceedings based upon or growing out of any alleged violation of this chapter."

In the *Blaine* case, *supra*, a defendant claimed immunity under this provision of the National Prohibition Act, on the ground that he gave evidence at a revocation hearing conducted by the Prohibition Administrator. The Court of Appeals held that he had not brought himself within the terms laid down by the statute "for the reason that he did not testify in obedience to the subpoena of any court". *Sherwin v. United States*, 268 U. S. 369.

Accordingly, since petitioner was before a Grand Jury, §305(d) did not and could not confer any immunity upon him and he properly invoked his privilege against self-incrimination, as he, concededly, had the right to do in the absence of any immunity provision.

2. In the *Narcotics Control Act*, Title 18, U.S.C., §1406 [*infra*, p. 49], the *Immunity Act of 1954*, Title 18, U.S.C., §3486(c) [*infra*, p. 43] and the *Defense Production Act of 1950*, Title 50, U.S.C., App., §2155(a), (b) [*infra*, p. 46], Congress specifically mentioned the grand jury as a body before which immunity may be obtained. In the *Federal Deposit Insurance Corporation Law*, Title 12 U.S.C., §1820(c), (d) [*infra*, p. 44], while the Board of Directors may apply to a judge or clerk of any United States Court for a subpoena, the immunity power extends only to a hearing, examination or investigation by the Board.

And the direction of the District Court that petitioner answer based upon its finding of immunity, was not a lawful order and petitioner's refusal to comply with the Court's direction could not constitute contempt.

POINT II

Assuming that immunity was conferred upon Petitioner by §305(d), Motor Carriers Act, this immunity was not co-extensive with his constitutional privilege against self-incrimination.

Even if the Courts below were assumed to be correct in holding that §305(d), Motor Carriers Act [*infra*, p. 33] incorporated §46, Interstate Commerce Act [*infra*, p. 33] *in toto*, the question necessarily arises whether the immunity attempted to be provided is constitutionally sufficient, that is, is it co-extensive with petitioner's constitutional privilege against self-incrimination. *Counselman v. Hitchcock*, 142 U. S. 547.

§305(d) commences "so far as may be necessary for the purposes of this chapter". This language limits the proffered immunity and makes it futile and worthless.

If, for example, the Government before the grand jury went beyond the concededly incriminatory questions put to petitioner (which we assume *arguendo* to be relevant to an investigation under the Motor Carriers Act) and inquired as to matters outside the scope of such an investigation, such as possible Internal Revenue violations and other offenses, would it not be possible for the Government then to contend that all that was done before

the grand jury which was necessary for the purposes of the Motor Carriers Act were the questions now asked of the petitioner and that all the other inquiries were not necessary and that consequently the immunity did not apply?

If the Government were correct in such an argument, then petitioner, deprived of his privilege by this immunity provision, would be liable to prosecution based on his own testimony, if the same were incriminatory.

Petitioner would also, if this possible Government argument as to the limitation on the immunity provision were upheld, be in this position—having been asked concededly incriminatory questions at the very outset of the investigation and having, let us suppose, failed, *in limine* (contrary to his action) to claim his privilege—he would be deemed to have waived the privilege and would then be liable in contempt for failing to answer in the other fields of investigation or to indictment on the crimes, if any, disclosed by his testimony other than on matters under the Motor Carriers Act. *Cf., U. S. v. Price*, 96 Fed. 960 (D. Ky.).

Even if petitioner in answering the questions involved here touched incidentally upon other crimes, it would be open to the Government to argue that such testimony was not necessary for the purposes of the Motor Carriers Act.

Consequently, it is submitted, the immunity purported to be granted by §305(d) is not co-extensive with the privilege.

The purported immunity is not co-extensive with his privilege against self-incrimination for the further reason that petitioner has been before two other grand juries in the Southern District of New York (R 26, 27). There he was told by the prosecutor that he is a prospective defend-

ant (R. 28). Petitioner continues under subpoena to appear before the grand juries.

In this situation the Government in its investigation of possible violations of the Motor Carriers Act may develop clues and leads which will furnish it with evidence for use before the other grand juries to incriminate petitioner and cause his indictment and prosecution.

Consequently, under §305(d) despite the language of §46; Title 49, U.S.C., petitioner's situation is markedly similar to that of the witness in *Counselman v. Hitchcock*, *supra*, where this Court said at page 564:

"It remains to consider whether §860 of the Revised Statutes removes the protection of the constitutional privilege of Counselman. * * * It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

"The constitutional provision distinctly declares that a person shall not 'be compelled in any criminal case to be a witness against himself;' and the protection of §860 is not co-extensive with the constitutional provision."

Here, moreover, petitioner is under direct notice from the prosecutor that he is a prospective defendant in other grand jury proceedings. Yet he is being compelled to testify without the protection of his privilege against self-

incrimination. He faces real jeopardy and therefore the purported immunity is not co-extensive with the privilege.³

Since the proffered immunity under §305(d), Motor Carriers Act, is not co-extensive with the privilege against self-incrimination, petitioner had a valid right to claim the privilege and could not be held in contempt for doing so.

POINT III

The District Court proceedings deprived Petitioner of his rights under Rule 42(b) of Criminal Procedure and the constitutional requirements of Due Process and the fundamental fairness required in Federal criminal proceedings. Petitioner was compelled to testify against himself in a criminal proceeding. The fundamental safeguards due the defendant in a criminal cause were not accorded Petitioner.

This case presents for review the validity of the proceedings in the Second Circuit for the handling of recalcitrant grand jury witnesses before grand juries. *Cf., U. S. v. Curcio*, 234 F. 2d 470, reversed 354 U. S. 118.

The procedure followed here by the District Court and approved by the Court of Appeals is, it is respectfully

3. Nor was petitioner permitted the opportunity to obtain the minutes of his other grand jury appearances to show the real danger and the substantial relationship. Nor did the District Court examine these minutes. *Cf., Youngdahl, J., in U. S. v. Onassis*, 125 F. Supp. 190. The failure to do either deprived petitioner of his opportunity to defend and vitiated the proceedings. *U. S. v. Andolschek*, 142 F. 2d 503; *U. S. v. Zwillman*, 108 F. 2d 802.



submitted, violative of Due Process and the fundamental rights of defendants in criminal cases.⁴

Moreover, this procedure followed in the Second Circuit has the effect of nullifying subdivision (b) of Rule 42 of the Rules of Criminal Procedure insofar as applicable to recalcitrant grand jury witnesses.

A. Rights Of A Recalcitrant Grand Jury Witness.

The rights of a witness claimed to be recalcitrant before a grand jury have been well established.

Rule 42(b) of the Rules of Criminal Procedure [*infra*, p. 37] requires that criminal contempts shall be prosecuted on notice, stating the place and time of hearing and the essential facts constituting the criminal contempt charge and allowing a reasonable time for the preparation of the defense.

Rule 42(b) is, of course, only the application to criminal contempts of the requirements of due process contained in the Fifth Amendment to the Constitution and the fundamental fairness required to be a necessary attribute of Federal criminal procedure.

But the rights of a party to a criminal contempt proceeding go beyond mere notice, opportunity to prepare and hearing. The safeguards surrounding criminal prosecutions must be afforded to the party.⁵ *Cammer v. U.S.*, 350 U.S. 399, 403; *Re Michael*, 326 U.S. 224; *Nye*

4. The procedure here followed is in direct conflict with the holding of the First Circuit Court of Appeals in *Carlson v. U.S.*, 209 F. 2d 209, and of the Court of Appeals for the District of Columbia in *Wong Gim Ying v. U.S.*, 231 F. 2d 776, 779, 780 [see also *Powell v. U.S.*, 226 F. 2d 269 (App. D.C.)] and in conflict with the decision of this Court in *Ex Parte Savin*, 131 U.S. 267, 277.

5. "Since a charge of criminal contempt is essentially an accusation of crime, all the constitutional safeguards available to an accused in a criminal trial should be extended to prosecutions for such contempt." Frankfurter and Greene, *The Labor Injunction*, 226.

v. U.S., 313 U.S. 33. Otherwise "too great inroads on the procedural safeguards of the Bill of Rights" would be permitted. *Re Michael, supra*, 227.

As pointed out in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444:

"* * * it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt and cannot be compelled to testify against himself."

Measured against these basic requirements of a proceeding in criminal contempt, namely notice, opportunity to prepare, hearing, presumption of innocence, proof of guilt beyond a reasonable doubt and freedom from compulsion to testify, the proceedings in this case and in other similar cases in the Second Circuit fall far short and obviously constitute merely a putatively clever device to circumvent these principles and to deprive the witness of his rights. *Cf. Matusow v. United States*, 229 F. 2d 335 (C.A. 5).

The procedure here and in other such proceedings in the Second Circuit are so contrived that the commission of the alleged contempt and the adjudication is one interrelated action.

The sudden and almost miraculous transmutation of a proceeding (described not as a hearing but merely an attempt to obtain the assistance of the Court) into a criminal contempt done in the presence of the Court (although actually done, if at all, in the grand jury room) which is the hallmark of this type of proceedings in the Second Circuit enables the Government to debase the fundamental rights of parties which adhere to any criminal proceeding including one for criminal contempt.

The claim that the proceeding is merely an attempt to secure the assistance of the Court in obtaining the testi-

mony of petitioner is self-evidently spurious. Is it not clear that, from the time that the petitioner first appeared before the Court at the direction of the grand jury until the time when the Court finally directed him, question by question, to answer, the petitioner was in jeopardy and faced, in view of the announced purpose of these proceedings in the Second Circuit and their characteristic endings, a finding of criminal contempt purportedly committed in the presence of the Court and, hence, he was put on the defense of his claimed right not to answer these questions and of his conduct?

It is no answer to say that petitioner had a hearing, in that the Court listened to his counsel's arguments, when he was not permitted to make any defense on the issues of fact existent in the matter and his presumption of innocence was abrogated and he was compelled to take the stand.

Besides it was, if a hearing, held before the offense, if any, was committed—certainly a novel doctrine.

B. Correct Procedure In Grand Jury Contempts.

The correct procedure in the situation presented here is well set forth in *Carlson v. U. S.*, 209 F. 209, 216 (C. A., 1) and *Wong Gim Ying v. U. S.*, 231 F. 2d 776, 779, 780. These cases rest firmly upon the foundation of *Ex Parte Savin*, 131 U. S. 267 and *Cooke v. United States*, 267 U. S. 517.

In the *Carlson* case the Court described the proper procedure, as follows: If the witness is recalcitrant on the ground of his claim of possible self-incrimination, he is to be brought before the Court which is to rule on the availability of the claim of privilege; if the privilege is overruled by the Court, it "would then normally instruct the witness to go back to the grand jury and answer the question. If the witness then and there, in the face of the

Court, declined to do so, this is disobedience to a lawful order of the Court * * * ; and since this disobedience occurs in the 'actual presence' of the Judge it may be punished summarily under Rule 42(a)."

Hence, according to the *Carlson* case, if at this point the witness *refuses to return* to the grand jury room and answer the questions, it is his *refusal to return*, which is a contempt committed in the presence of the Court and punishable summarily.

But, if the witness returns to the grand jury room the First Circuit said in *Carlson* at page 216:

"* * * and there again refuses to answer the question which the court directed him to answer, this is still disobedience of a lawful order of the court * * *. But because such disobedience did not take place in the actual presence of the court, and thus could be made known to the court only by the taking of evidence, the court would have to conduct the proceeding in criminal contempt in accordance with Rule 42(b)."

It is at this point that Second Circuit proceedings branch off from the proceedings outlined in the *Carlson* case as proper and proceed post-haste to the deprivation of the witness' fundamental rights.

In the *Carlson* case, it was made clear that, at this point, if the witness still claimed his privilege, it was not a criminal contempt proceeding and the "worst that could happen, if the ruling is against him (the witness), is that he would be given a second chance to go before the grand jury and answer the questions." *Cf., Powell v. U. S.*, 226 F. 2d 269.

If, on the other hand, he is being charged with misconduct in the jury room, constituting misbehavior in the presence of the Court, the Court in *Carlson* said that "this charge must be prosecuted on notice, and under Rule 42(b) the notice 'shall state the essential facts constituting the criminal contempt charged and describe it as such'".

Then specifically directing itself to a situation exactly opposite to that presented by this case, the Court said at page 216:

"If the charge of criminal contempt is that the witness declined to answer the questions upon the pretended ground that the answers would tend to incriminate him, this claim of privilege being advanced in bad faith, then (assuming that such conduct might be deemed misbehavior in the presence of the court within the meaning of 18 U.S.C. §401(1) the required notice under Rule 42(b) would have to describe the alleged misbehaviors in order that the witness, in preparing his defense to the charge, may direct his evidence to the issue of his good faith in claiming the privilege."

It is respectfully submitted that this procedure outlined in the *Carlson* case is obligatory in a proceeding such as presented by this case and because not followed the proceedings here are vitiated.

Especially applicable here is the language of this Court in *Re Oliver*, 333 U. S. 257, 275:

"Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case [337 U. S. 517] requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public".

And in the *Oliver* case this Court said that "the right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of 'demoralization of the Court's authority'." 333 U. S. 257, 278.

Because of the existence of Rule 42(b) it is quite clear that Rule 42(a) can only apply to acts actually done in the presence of the Court which tend to demoralize the Court's authority before the public. Since, however, the refusal of the witness to testify before a grand jury occurs in its room, what reason can there be to invoke Rule 42(a) in the manner followed here other than to circumvent Rule 42(b) and to do indirectly what cannot be done directly? *Wong Gim Ying v. U. S., supra*.

Thus a strange procedure has been established in which a witness is compelled to commit the allegedly wrongful act again in the presence of the Court so that his rights and privileges can be avoided.

The conflict between the decision here and those of other Courts of Appeal and with decisions of this Court is clear. Moreover there has been such a departure here from the usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision.

C. Petitioner Could Not Be Compelled To Take The Stand.

The Court of Appeals held that the District Court had the right to compel petitioner to take the stand and to answer questions. It specifically held that the proceeding was not a criminal proceeding but merely one which was "ancillary to the grand jury investigation".

The Court of Appeals also held that to prevent the District Court "from inquiring of the witness whether he is willing to answer questions, would frustrate the proper operations of the grand jury * * *" and that the "Court is merely being advised as to what had already happened before the grand jury". This latter holding of the Court

of Appeals is directly contrary to the holding of this Court in *Ex Parte Savin*, 131 U. S. 267, 277, where Mr. Justice Harlan said:

"It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form' * * *; whereas, in cases of misbehavior of which the Judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished."

Here the District Court knew of the contempt only through the confession of the petitioner obtained in violation of his fundamental rights in a criminal case⁶ not to take the stand and testify and through the testimony of others, namely, the Grand Jury stenographer. Under *Ex Parte Savin*, *supra*, and Rule 42(b) of the Rules of Criminal Procedure, the practice followed was consequently invalid and improper.

With respect to the first ground stated by the Court of Appeals for the rejection of petitioner's contention that he should not have been compelled to take the stand before the District Court, namely, that the proceeding was not a criminal proceeding and merely ancillary to the grand jury investigation, the fact is that from the moment petitioner was returned to the District Court after having refused for the second time to answer the questions put

6. Even though criminal contempts are held by this Court not to be crimes within the Constitutional guaranty of trial by jury (*Green v. United States*, 2 L. ed. 2d 672), a criminal contempt proceeding must be a criminal case. See Holmes, J. in *Gompers v. United States*, 233 U.S. 604, 610, 611.

to him before the grand jury, he was in jeopardy of his liberty and the proceeding was, therefore, criminal in nature. Whether ancillary or plenary, or merely as the District Court thought, an extension of the grand jury proceeding, jeopardy for the petitioner existed and the proceeding was criminal in nature.⁷

This Court has held that in proceedings which result in a judgment of criminal contempt, the defendant is entitled to the rights accorded to the defendant in criminal cases. *Cammer v. U. S.*, 350 U. S. 399, 403; *Re Michael*, 326 U. S. 224; *Nye v. U. S.*, 313 U. S. 33; *Michaelson v. U. S.*, 266 U. S. 42, 66; *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 444.

And, as pointed out in *U. S. v. Lawn*, 115 F. Supp. 674, 677, it is in a criminal case "a clear violation of a defendant's right against self-incrimination under the Fifth Amendment of the Constitution to compel him to take the stand, testify and produce his records, relating to the matter with which he is charged * * * it would invalidate the trial. * * * Title 18 U. S. C. A., §3481 makes a defendant a competent witness *at his own request*. It is thus improper to call him as a witness without a request on his part". [Emphasis in original] *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 444. See *U. S. v. Scully*, 225 F. 2d 113 (C. A. 2).

Thus this case presents basic and important questions of constitutional law affecting criminal contempt proceedings and requiring the vindication and re-establishment of Rule 42(b). It is clear that here not even the minimal procedural requirements of Rule 42(b) were observed and Rule 42(a) was misapplied and abused.

D. The Secrecy Of The Proceedings.

A vital defect in the proceedings in the District Court was the surrounding secrecy.

⁷ See footnote 6 *supra*.

While the record does not show that the courtroom was cleared by the Court on April 8, 1957 (the day conviction was had) that it was cannot factually be disputed and the Court of Appeals assumed such fact (R. 62). And the prosecutor on April 5, 1957 said to the Court that it is the procedure to clear the courtroom (R. 6).

In *Re Oliver*, 333 U. S. 257, this Court held that a contempt proceeding and sentence must be public.

The Court of Appeals (R. 62) rejected this contention on the ground it had not been raised in the District Court.

The right to a public trial being so fundamental, the infringement thereof cannot, it is respectfully submitted, be overlooked on appeal or in this Court, because of counsel's failure to raise it in the trial court.

POINT IV

The sentence was an abuse of discretion and improper.

In this case petitioner received a sentence of one year and three months. The Court of Appeals held that the sentence did not violate the Eighth Amendment to the Constitution, that it was not an abuse of discretion and that the Court could impose a coercive sentence in a criminal contempt proceeding without a purge clause.

The Court of Appeals here held the sentence proper in view of the sentences in *Warring v. Huff*, 122 F. 2d 641 (App. D. C.) [two consecutive sentences of thirteen months]; *Conley v. U. S.*, 59 F. 2d 929 (C. A., 8) [two years]; and *Hill v. U. S.*, 300 U. S. 105 [concurrent sentences of a year and a day and two years].

On the other hand the Court of Appeals ignored much lesser sentences imposed by District Courts in its circuit upon recalcitrant grand jury witnesses. In *U. S. v. Gordon*, 236 F. 2d 916, the sentence was six months; in *U. S. v.*

Courtney, 236 F. 2d 921—three months; in *U. S. v. Trock*, 232 F. 2d 839—four months; in *U. S. v. Curcio*, 234 F. 2d 470—six months; and in *U. S. v. Weinberg*, 65 F. 2d 394—sixty days.

Both courts below omitted to consider as an element in determining the sentence the penalty attached to the substantive criminal offense involved. Here, under Section 322 of the Interstate Commerce Act, the only punishment which could be imposed upon petitioner is a fine. This failure to consider the quantum of the penalty attached to the substantive criminal offenses is in conflict with *Moore v. U. S.*, 150 F. 2d 323 (C. A. 10).

The United States Attorney did not request a specific sentence but insisted upon a strong coercive sentence, as he characterized it, and this sentence was the result.

This Court has held that the sentence in a criminal contempt proceeding must be punitive and not coercive. *U. S. v. United Mine Workers*, 330 U. S. 258, 302. On the other hand, if the sentence could be coercive, a purge clause necessarily had to be included which was not done here.

The sentence was, therefore, an abuse of discretion and improper.

CONCLUSION

The judgment of conviction of petitioner for criminal contempt should be reversed and his acquittal directed.

Respectfully submitted,

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Counsel for Petitioner.

MYRON L. SHAPIRO,

Of Counsel.

APPENDIX TO BRIEF

Statutes and Rules

Motor Carriers Act, Immunity Provision, Title 49, U.S.C., Ch. 8, Section 305(d):

"So far as may be necessary for the purposes of this chapter, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpoena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title; and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, unless otherwise provided in this chapter."

Interstate Commerce Act, Immunity Provision, Title 49, U.S.C., Ch. 2, Section 46:

"No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of

him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than \$100 nor more than \$5,000, or by imprisonment for not more than one year or by both such fine and imprisonment."

Federal Trade Commission Act, Immunity Provision,
Title 15, U.S.C., Ch. 2, Section 49:

"For the purposes of sections 41-46 and 47-58 of this title the commission, * * * shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. * * *

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or sub-

jected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it * * *."

Securities Act of 1933, Immunity Provision, Title 15, U.S.C., Ch. 2A, Section 77v (c):

"No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

Merchant Marine Act, 1936, Immunity Provision, Title 46, U.S.C., Section 1124(c):

"No person shall be excused from attending and testifying or from producing books, papers, or other documents before the Board, or any member or officer or employee thereof, or the Secretary, in any investigation instituted by the Board or the Secretary under this chapter, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or sub-

ject him to a penalty or forfeiture; but no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, * * *."

Perishable Commodities Act, Immunity Provision, Title 7, U.S.C., Section 499m (f):

"No person shall be excused from attending, testifying * * * before the Secretary or any officer or employee designated by him, in obedience to the subpoena of the Secretary or any such officer or employee, in any cause or proceeding, based upon or growing out of any alleged violation of this chapter, * * * upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him * * *. But no natural person shall be prosecuted * * * for or on account of any transaction, matter, or thing, concerning which he is compelled under oath so to testify, * * * before the Secretary or any officer or employee designated by him, in obedience to the subpoena of the Secretary, or any such officer or employee, * * * or in any such cause or proceeding: * * *."

Taft-Hartley Act, Immunity Provision, Title 29, U.S.C., Section 161(3):

"No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted

* * * for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, * * *"

Federal Rules of Criminal Procedure:

Rule 42. Criminal Contempt [18 U.S.C.A.].

"(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

"(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Code of Criminal Procedure:

§401. Title 18, U.S.C. Power of court

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

§3481, Title 18, U.S.C. Competency of accused

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

China Trade Act, Title 15, U.S.C., §155.

"(a) For the efficient administration of the functions vested in the registrar by this chapter, he may require, by subpoena issued by him . . .

(1) the attendance of any witness and the production of any book, paper, document, or other evidence. . . . The registrar, or any officer, employee, or agent of the United States authorized in writing by him, may administer oaths and examine any witness. . . .

"(c) No person shall be excused from so attending and testifying * * * on the ground that the testimony * * * required of him may tend to incriminate him * * * but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, he may so testify * * *."

Social Security Act, Immunity Provision, Title 42, U.S.C., § 405, (d), (f).

"(d) For the purpose of any hearing, investigation, or other proceeding authorized or directed under sections under this subchapter, or relative to any other matter within his jurisdiction hereunder, the Secretary shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the Secretary * * *."

"(f) No person so subpoenaed or ordered shall be excused from attending and testifying * * * on the ground that the testimony or evidence required of him may tend to incriminate him * * * but no person shall be prosecuted * * * for, or on account of, any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence * * *."

Atomic Energy Act, Immunity Provision, Title 42, U.S.C., § 2201.

"(c) make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter, or in the administration or enforcement of this chapter, or any regulations or

orders issued thereunder. For such purposes the Commission is authorized to administer oaths and affirmations, and by subpoena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place. No person shall be excused from complying with any requirements under this paragraph because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893, shall apply with respect to any individual who specifically claims such privilege."

Rent Control Act, Immunity Provision, Title 50, U.S.C., War App., § 1896.

"(f) (1) The President is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information, as he deems necessary or proper to assist him in prescribing any regulation or order under this Act * * * or in the administration and enforcement of this Act * * * and regulations and orders prescribed thereunder.

"(3) For the purpose of obtaining information under this subsection, the President may by subpoena require any person to appear and testify or to appear and produce documents, or both, at any designated place. * * *

"(6) No person shall be excused from attending and testifying or producing documents or from complying with any other requirement under this subsection because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893, shall apply with respect to any individual who specifically claims such privilege."

Motor Carriers Act, Title 49, U.S.C., § 322.

"Any person knowingly and willfully violating any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than \$100 for the first offense and not more than \$500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

* * * * *

"(c) Any person, whether carrier, shipper, consignee" or broker, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give, or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this chapter, or who by means of any false statement or representation or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this chapter for less than the applicable rate, fare, or charge, or who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this chapter provided for motor carrier or brokers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than \$500 for the first offense and not more than \$2,000 for any subsequent offense.

"(d) Any special agent, accountant, or examiner who knowingly and willfully divulges any fact or information which may come to his knowledge during the course of any examination or inspection

made under authority of section 320 of this title, except as he may be directed by the Commission or by a court or judge thereof, shall be guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than \$500 or imprisonment for not exceeding six months, or both."

United States Constitution, Amendments V, VI and VIII.

V

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"

VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense;"

VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Commodity Exchange Act, Title 7, U.S.C. (1946 ed.), §15.

"For the purpose of securing effective enforcement of the provisions of this chapter, the pro-

visions, including penalties, of sections 12 and 46-48 of Title 49, as amended and supplemented relating to the attendance and testimony of witnesses, the production of documentary evidence, and the immunity of witnesses, are made applicable to the power, jurisdiction, and authority of the Secretary of Agriculture, the said commission, and said referee in proceedings under this chapter, and to persons subject to its provisions."

Immunity Act of 1954, Title 18, U.S.C., §3486.

"(c) Whenever in the judgment of a United States attorney the testimony of any witness * * * in any case or proceeding before any grand jury or court of the United States involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, * * * is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture."

Emergency Price Control Act, 56 Stat. 30 (1942) §202.

"(a) The Administrator is authorized to make such studies and investigations, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

"(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

"(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 * * * shall apply with respect to any individual who specifically claims such privilege."

Federal Deposit Insurance Corporation Law, Title 12, U.S.C., §1820.

"(a) The Board of Directors shall administer the affairs of the Corporation fairly and impartially and without discrimination. * * *

"(c) For the purpose of any hearing under this chapter, the Board of Directors, any member thereof or any person designated by the Board of Directors to conduct any such hearing, is empowered to administer oaths and affirmations, subpoena any officer or employee of the insured bank, compel his attendance, take evidence, * * *. For the purpose of any hearing, examination, or investigation under this chapter, the Board of Directors may apply to any judge or clerk of any court of the United States * * * to issue a subpoena commanding each person to whom it is directed to attend and give testimony * * * at a time and place and before a person therein specified. * * *

"(d) No person shall be excused from attending and testifying or from producing books, records, or other papers in obedience to a subpoena issued under the authority of this chapter on the ground

that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture; * * *

Industrial Alcohol Act, 53 Stat. 363, §3119, Title 26, U.S.C. (1946 Ed.), now §5315, Title 26, U.S.C.

"No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpoena of any court in any suit or proceeding based upon or growing out of any alleged violation of this part; * * *"

Civil Aeronautics Act, Title 49, U.S.C., Ch. 9, §644(i).

"(i) No person shall be excused from attending and testifying, or from producing books, papers, or documents before the Board, or in obedience to the subpoena of the Board, or in any cause or proceeding, criminal or otherwise * * * on the ground, or for the reason, that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; * * *

Export Controls Act, Title 50, App., U.S.C., §2026 (a), (b).

"(a) To the extent necessary or appropriate to the enforcement of this Act the head of any department or agency exercising any functions hereunder (and officers or employees of such department or agency specifically designated by the head thereof) may make such investigations and obtain such information from, require such reports or the keeping of such records by, make such inspection of the books, records, and other writings, premises, or property of, and take the sworn testimony of, any person. In addition, such officers or employees may

administer oaths or affirmations, and may by subpoena require any person to appear and testify * * *

“(b) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (27 Stat. 443) shall apply with respect to any individual who specifically claims such privilege.”

Defense Production Act of 1950, Title 50, U.S.C., App. §2155.

“(a) The President shall be entitled, while this Act is in effect and for a period of two years thereafter, by regulation, subpoena, or otherwise, to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, and take the sworn testimony of, and administer oaths and affirmations to, any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act and the regulations or order issued thereunder. * * *

“(b) No person shall be excused from complying with any requirements under this section or from attending and testifying or from producing books, papers, documents, and other evidence in obedience to a subpoena before any grand jury or in any court or administrative proceeding based upon or growing out of any alleged violation of this Act on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture;”

War and Defense Contract Acts of 1951, Title 50, App., U.S.C., §1152(a)(4).

"(4) For the purpose of obtaining any information, verifying any report required, or making any investigation pursuant to paragraph (3), the President may administer oaths and affirmations, and may require by subpoena or otherwise the attendance and testimony by witnesses. * * * No person shall be excused from attending and testifying or from producing any books, records, or other documentary evidence or certified copies thereof or physical evidence in obedience to any such subpoena, or in any action or proceeding which may be instituted under this subsection, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;"

Second War Powers Act, Title 50, App., U.S.C. §643a.

"For the purpose of obtaining any information or making any inspection or audit pursuant to section 1301, any agency acting hereunder, or the Chairman of the War Production Board, as the case may be, may administer oaths and affirmations and may require by subpoena or otherwise the attendance and testimony of witnesses. * * * No person shall be excused from attending and testifying or from producing any books, records, or other documentary evidence or certified copies thereof or physical evidence in obedience to any such subpoena, or in any action or proceeding which may be instituted under this section, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject to a penalty or forfeiture;"

Investment Advisers Act, Title 15, U.S.C., §80b-9.

"(d) No person shall be excused from attending and testifying or from producing books, papers,

correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;”

Investment Companies Act, Title 15, U.S.C., §80a-41.

“(d) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpoena of the Commission, or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;”

Public Utility Holding Company Act, Title 15, U.S.C., §79r.

“(e) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;”

Securities Exchange Act, Title 15, U.S.C., §78u.

"(d) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other records and documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required by him may tend to incriminate him or subject him to a penalty or forfeiture;"

Shipping Act of 1916, Title 46, U.S.C., §827.

"No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence, in obedience to the subpoena of the Commission or of any court in any proceeding based upon or growing out of any alleged violation of this chapter;"

Narcotics Control Act, Title 18, U.S.C., §1406.

"Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of— * * * is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify * * *. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence,

nor shall testimony so compelled be used as evidence in any criminal proceeding * * * against him in any court.

Natural Gas Act, Title 15, U.S.C., 717m.

"(h) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;"

Federal Communications Act, 47 U.S.C., §409 (1):

"No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty of forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence."

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OCT 10. 1958

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1958

No. 4

EMANUEL BROWN,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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1

IN THE
Supreme Court of the United States
OCTOBER TERM, 1958

No. 4

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v.

UNITED STATES OF AMERICA,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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PETITIONER'S REPLY BRIEF

In this reply brief we shall avoid, insofar as possible, repeating the arguments set forth in our main brief. We shall direct ourselves principally to certain new arguments made by the Government.

I

**Replying to Government's Point I
(Gov't Br., 16, *et seq.*).**

(1) The Government argues (Gov't Br., 21, 22, 26) that §305(d) must be construed the same as §916(a), Water Carriers Act, and §1017(a), Freight Forwarders Act (both Title 49, U.S.C.). These latter two sections in language entirely different from §305(d) specifically, without limitation, incorporate §46 and make its immunity provision applicable to both Commission and grand jury proceedings. The Government says that Parts I

(Railroad), III (Water Carriers), and IV (Freight Forwarders) of the Interstate Commerce Act are in *pari materia* with Part II (Motor Carriers) and that, therefore, the immunity grant in the last Part is equivalent to that in the other Parts of the Act.

While the 1940 preamble to the Interstate Commerce Act declared the Nation's transportation policy and the intention of Congress to provide an integrated regulatory system of railroad, water and motor carriers, it effected no change in the specific provisions covering each element of that system.

In *Consolidated Freightways v. United Truck Lines*, 216 F. 2d 543 (C.A. 9th), cert. den. 349 U. S. 905, plaintiff, a certificated motor carrier, sued an uncertificated motor carrier for damages for the diversion of traffic from the plaintiff on its certificated route. The Court of Appeals held that the cause of action for damages allowed by §§8 and 9 of the original Interstate Commerce Act did not give a cause of action for money damages for a similar violation of the Motor Carriers Act, which does not provide such a remedy.

The original Interstate Commerce Act, provides for fine and imprisonment for offenses under Part I (Title 49, U.S.C., §§10, 20(7)(b)) while the Motor Carriers Act, §322 provides only for fines. Obviously on a prosecution under §322, Motor Carriers Act, a court could not impose a sentence of both fine and imprisonment on the Government's theory that these Parts of the Interstate Commerce Act are in *pari materia* to be read and considered interchangeably.

While §1019, Freight Forwarders Act, Title 49, U.S.C., contains an amnesty for certain acts done prior to its effective date, the Motor Carriers and Water Carriers Acts have no such provision. This amnesty could not be imported into the three other Parts on the Government's theory of integration and *pari materia*.

Moreover the preamble "cannot enlarge or confer powers or control the words employed in the provisions of the Act itself." *In re American States Public Service Co.*, 12 F. Supp. 667, 681.

(2) The Government's reference to the Congressional Record in its brief (p. 24) is not at all illuminating. These were committee amendments, there was no debate and no explanation was given by the committee for the amendments.

The amendments [both adopted simultaneously in time as one amendment to one section] did not affect the substance of §305(d). In the first clause the donees of the powers granted are restricted by the language "the Commission * * * and joint boards shall have the same power." The amendment to this clause did not limit or expand this grant; after its adoption the first clause said the same thing as it did before.

Similarly, in the second clause between the original text "as are provided in part. I" and the adopted words, "as though such matter arose under Part I", there is no apparent difference which could be said to bear upon this problem of construction. It is the repetition in the second clause of the words of the first clause: "any matter under investigation", not the language of the amendment, which confines the statutory proffer of immunity to those who are "subpoenaed or testifying" perforce before the Commission under its power given by the first clause to compel testimony.

(3) At page 29 of its brief the Government urges that the judicial history of §46 "is a gloss on" §305(d). This "judicial gloss" is of no help in determining whether the inclusion in §46 of grand juries as bodies able to grant immunity was carried over into §305(d). *Shapiro v. United States*, 335 U. S. 1, 20, cited by the Government,

involved the Price Control Act which also incorporated §46 by reference. Significant here is that that immunity provision by the terms of its incorporation was limited to the Price Administrator and did not extend to grand juries (Pet'rs. Br., 17, 18, 43, 44). The question involved here was not raised or considered in the *Shapiro* case.

(4) Nor does this case raise the question of the scope of the grand jury's power to investigate, as implied by the Government (Br., 19); it does put forward the issue of that body's power to grant immunity under a statute such as §305(d)—since the grand jury has no inherent power to grant immunity, such power exists only when specifically granted.

II

Replying to Government's Point II (Gov't Br., 33, *et seq.*).

Petitioner in Point II of his brief (p. 19, *et seq.*) argues that the language at the commencement of §305(d) "so far as may be necessary for the purposes of this chapter" limits the immunity purportedly granted and makes it inadequate as a substitute for the Constitutional privilege.

The Government now, as it did on the petition for certiorari, argues (Gov't Br., 33) as though petitioner had claimed that the phrase "in connection with any matter under investigation under this chapter" limited the immunity to offenses arising under the chapter.

But that is not petitioner's point and no answer is suggested by the Government to the argument actually made.

III

Replying to Government's Point III
(Gov't Br., 35, *et seq.*).

The Government concedes that, after petitioner had been directed by the Court to return to the grand jury room and answer and there persisted in his refusal to answer; contempt proceedings therefor could have been instituted against him under Rule 42(b) and that such proceedings would have had to be on notice, since such contempt was not in the presence of the Court (Gov't Br., 40). The Government itself says that "such a proceeding would have been necessary 'to inform the court of events not within its own knowledge'" (Gov't Br., *ibid*).

But, the Government argues, the contempt for which petitioner was convicted was not his second recalcitrance in the grand jury room; the contempt was committed when petitioner was again returned by the grand jury to the courtroom, and there upon interrogation by the Court, refused to answer the questions and stated that he would persist in such refusal, if returned to the grand jury room (Gov't Br., 35).

The Court of Appeals held (R. 62) that "this hearing before the District Judge was * * * merely a proceeding ancillary to the grand jury investigation," that the District Court was "merely being advised as to what had already happened before the grand jury" and that petitioner "had already made it clear, both to the grand jury and the Court, that he refused to answer." The Court of Appeals concluded (R. 62) that, even if petitioner had "remained mute and refused to speak at all, the result would have been the same."

The Court of Appeals thus, contrary to the Government's position here, held that petitioner's second recalcitrance in the grand jury room was disobedience in the

actual presence of the Court punishable, summarily under Rule 42(a).

This refusal by the Court of Appeals to follow Rule 42(b) and *Ex Parte Savin*, 131 U. S. 267, the Government now rejects, because it admits that, if the contempt punished was that allegedly done in the grand jury room, petitioner must be prosecuted on notice under Rule 42(b) and that, if the Court was to be advised of what happened in the grand jury room, that is, as to "events not within its own knowledge", a proceeding under Rule 42(b) "would have been necessary" (Gov't Br., 40).

The Government nevertheless seeks to justify the conviction as a contempt punishable under Rule 42(a). It asserts that the proceedings on petitioner's second return to the courtroom were a continuation of the grand jury proceeding before the Court (R. 40; Gov't Br., 44). The Government argues that the District Judge chose not to consider as a complete contempt petitioner's second refusal in the grand jury room to answer the questions directed to be answered.¹

The Government's argument based upon this theory of continuation of the grand jury proceeding, cannot sustain the conviction here. It is as erroneous as that of the Court of Appeals.

(1) In the grand jury room petitioner had definitely, effectively and completely indicated his refusal to answer the questions directed to be answered. Neither the District Court nor anybody else could subjectively determine that that act, if a contempt, was not complete and consider it open subject to being closed by further acts of the petitioner. The Court of Appeals was undoubtedly correct in holding that his contempt, if any, was then complete. Its error was in deciding that he could for such act be con-

¹ The Government's theory is apparently that the District Court had the power of amnesty for the alleged contempt before the grand jury. This is self-evidently not so. If it were a contempt, it remains such, prosecutable under Rule 42(b).

victed under Rule 42(a). The alleged contempt being complete in the grand jury room, the result of the Government's shift of position is the multiplication of contempts.

Strikingly apposite here is *United States v. Costello*, 198 F. 2d 200, 204 (C. A. 2nd) where Judge A. N. Hand said:

"We are of the opinion that the convictions on Counts 7, 9, 10 and 11 must be reversed. Each of those counts dealt with the defendant's refusal to answer a specific question put to him after he had flatly refused to give any further testimony on that particular day. Certainly the refusal to testify was an act in contempt of the Committee for which the defendant was subject to the punishment prescribed by the statute. But when the defendant made his position clear, the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions each time eliciting the same answer: his refusal to give any testimony. In other words, the contempt was total when he stated that he would not testify, and the refusals thereafter to answer specific questions can not be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were not separately punishable." (Emphasis in original.)

Even under *Yates v. United States*, 355 U. S. 66, the result is the same. Here there is an invalid attempt to multiply offenses which is even more startling, because it avoids the basic rights of petitioner under the Constitution and under Rule 42(b), adopted and promulgated by this Court to govern criminal contempt proceedings and which, as conceded by the Government, would require a hearing on notice for what transpired in the grand jury room on petitioner's second recalcitrance.

(2) If, indeed, what transpired before the District Judge was a continuation of the grand jury proceeding, it could only be an invalid and improper proceeding.

Subdivision (d) of Rule 6 of the Federal Rules of Criminal Procedure provides that only Government attorneys, witnesses under examination, interpreters when needed, and a stenographer, may be present while the grand jury is in session.

But here in this so-called "continuance of the grand jury proceeding", there were intruders, to wit, the Judge (R. 36), the clerk (R. 45), "probably some Court-attendants" (Gov't Br., 49), petitioner's counsel (R. 36), the court stenographer and the grand jury stenographer (R. 37).

This so-called continuation of the grand jury investigation was therefore unlawful. *Latham v. United States*, 226 Fed. 420 (C.A. 5th).

As Judge Call said in the *Latham* case, *supra*, 424:

"The right of the citizen to an investigation by a grand jury pursuant to the law of the land is invaded by the participation of an unauthorized person in such proceedings, be that participation great or small. It is not necessary that participation should be corrupt, or that unfair means were used. If the person participating was unauthorized, it was unlawful. * * *"

See also *United States v. Edgerton*, 80 Fed. 374 (D. Montana); *People v. Minet*, 296 N. Y. 315.

The Government's characterization of the proceedings as a continuation of the grand jury investigation is thus bottomed upon an illegal and invalid proceeding. Certainly, if petitioner had answered the questions before the Court, any indictment based thereon would have been invalid because of the intruders. *A fortiori*, how can a contempt proceeding be based upon an order issued in an unlawful and invalid proceeding. The whole proceeding must necessarily fall.

(3) The Government also contends (Br. 44) that, if before this grand jury-judge tribunal petitioner had

answered the questions, he would have had immunity. If the immunity statute were applicable to grand jury proceedings, it necessarily presupposes a validity thereto. Since the proceedings as a grand jury proceeding were invalid, no immunity could attach and petitioner could claim his privilege against self-incrimination and the court's order to answer was not lawful.

(4) The Government's attempt to sustain the conviction here on the theory of a continuance of the grand jury proceeding is attempted to be justified (Gov't Br., 37, 38) historically. The claim is made that the proceeding here is merely that which was followed at common law and that that is all to which petitioner is entitled. The Government equates the power of the Court to compel testimony of recalcitrant grand jury witnesses with the power to punish for contempt.

The Government, of course, has confused the Court's powers of compulsion utilizable in proceedings affecting recalcitrant grand jury witnesses, especially after they have once been directed to answer.

The matter, however, is clarified in one of the cases cited by the Government. In *People ex rel. Phelps v. Fancher*, 4 Thompson & Cook (N. Y.) 467 (Gov't Br., 37), a grand jury witness refused on invalid grounds to answer a certain question and was committed to the county jail "until he may answer the questions propounded to him which he has refused to answer." The witness was released on habeas corpus on the ground that the imprisonment could not exceed thirty days. The General Term (an appellate court) held that the discharge of the witness was illegal, that the Court had the right to commit the recalcitrant witness until he answered the questions and that the term of the commitment could not be limited to the statutory thirty days.

But the General Term very clearly drew the distinction at common law, which, it is submitted, is applicable here,

between the commitment of a witness until he shall answer and the punishment as for a contempt, saying at page 471:

"Independent then of any statute authorizing the court of oyer and terminer to commit a witness for refusing to answer a proper question until answered, that court has ample power at common law to order such a commitment. *Such a proceeding is not one to punish a party as for a contempt, but the exercise of a power necessarily conferred to elicit truth and to administer justice.* It was not necessary to bring Mr. Shanks before the court, and formally adjudge him to be guilty of a contempt, but *upon his refusal to answer the question which the court adjudged to be proper, it might, by simple rule, have ordered him to be confined until he should answer.* After this step had been taken, the court had ample power to punish for the contempt of its lawful authority. The two proceedings are separate and distinct, and the exercise of the one in nowise conflicts with the exercise of the other." (Emphasis supplied)

This distinction apparently applies to the Federal courts as well. In *Loubriel v. United States*, 9 F. 2d 807, 809 (C.A. 2d), Judge Learned Hand pointed out that the commitment of the grand jury witness until he shall answer the questions was not an attempt to punish him as for a contempt "but to compel him to perform his duty."

It is not disputed here that the power to compel the testimony sought is vested in the Court (Gov't Br., 38), but the conviction here for criminal contempt was punitive, not compulsory. Accordingly the requirements of due process and of Rule 42(b) had to be complied with.

(5) It is difficult to understand the repeated citation by the Government of *Carlson v. United States*, 209 F. 2d 209 (C.A. 1) as authority for its contentions (Gov't Br., 39). As pointed out in petitioner's main brief (p. 25, *et seq.*) and as clearly appears from the excerpt

quoted by the Government (Br., 39), the *Carlson* case makes plain that after the direction of the Court to answer questions, the refusal of the recalcitrant witness in the grand jury room to answer the questions, can only be punished in a prosecution as a contempt under Rule 42(b).

The Government attempts to argue (Gov't Br., 40, fn. 16) that *Carlson v. United States*, *supra* and *Wong Gim Ying v. United States*, 231 F. 2d 776 (C.A. D.C.) are distinguishable, and states that it is not suggested in either case "that after an initial disobedience to the court's order to return to the grand jury room and answer the questions, the court cannot then order the witness to answer the questions in the presence of the grand jury and summarily hold him in contempt on his refusal to obey such final order."

The *Wong Gim Ying* case, *supra*, clearly states what is to happen if a witness is returned to the grand jury room and has again improperly refused to answer the specific questions as directed by the Judge.

Judge Danaher said at page 780:

"Had she been so directed, and had she then improperly refused to answer the specific questions pursuant to the judge's ruling that her self-incrimination claim lacked foundation, the next step would have called for prosecution on notice. In that circumstance, she would have received the protection of Rule 42(b).

"The 'failing to testify before the grand jury, as directed' obviously did not occur in the presence of the District judge. He did not see or hear the conduct constituting the contempt. Thus the adoption of the Rule 42(a) procedure was invalid, and it is clear that the requirements of Rule 42(b) were not complied with."

In conclusion, Judge Danaher said at page 780:

"We will, therefore, remand this case with directions that the Government, if it elects to proceed

with this appellant as a witness, accord to her the full protection to which she is entitled."

This is the procedure followed in the United States District Court for the District of Columbia,—see *Powell v. U. S.*, 226 F. 2d 269 and *Traub v. U. S.*, 232 F. 2d 43—and in other circuits—see *Camarota v. U. S.*, 111 F. 2d 243 (C.A. 3). Cf: *Paul v. U. S.*, 36 F. 2d 639 (C.A. 9)²

(6) *Summary*: While the District Court might have exercised its power of compulsion to commit the petitioner until he make answer to the questions, neither the views of the Court of Appeals nor the arguments of the Government in this Court can sustain the District Court's attempt to use Rule 42(a) to punish him for contempt—only proceedings under Rule 42(b) could be used to accomplish this result. In such proceedings petitioner was entitled to the due process outlined by Rule 42(b) and the rights of a defendant in a criminal case, including the right not to testify. If the proceeding here was a continuation of the grand jury proceeding, it was invalid, no lawful order could be issued by the District Court and the petitioner's claim of privilege was proper as the purported immunity could not attach in such an unlawful grand jury proceeding. The Government's argument leads to a multiplication of contempts.

Nor was this conviction necessary to the speedy and effective administration of criminal justice. The power of the Court to commit until answer is made remained un-

² The Government cannot argue (see Gov't Br., 37) that this Court's reversal in *Curcio v. U. S.*, 354 U. S. 118 and *Rogers v. U. S.*, 340 U. S. 367, on the Fifth Amendment questions presented was tantamount to an approval of the procedure followed. The Government made the same argument as to *Rogers* in *Curcio* in opposition to certiorari in the latter case (O.T. 1956, No. 260, Br. in opp. to pet. for cert., pp. 16, 17 and fn. 6); this Court nevertheless granted certiorari.

The *Rogers* case, *supra*, is, moreover, not in point, because there the gravamen of the complaint was the alleged denial of counsel. (O.T. 1950, No. 20, Petr's Pet. for Reh., pp. 9, 10, 11).

abridged.—And so the observations of the Court of Appeals (R. 61) cited by the Government (Br., p. 43) are inapposite. The basic issue of procedural unfairness and the abrogation of Rule 42(b) cannot be obscured by concern for speedy criminal justice, especially where, as here, ample judicial power otherwise exists.³

IV

Replying to Government's Point IV (Gov't Br., 50, *et seq.*).

The Government attempts to justify the length of sentence by comparison with other contempt cases, ignoring the sentences in cases similar to the one at hand involving recalcitrant grand jury witnesses set forth at page 31 of petitioner's brief.

Green v. United States, 356 U. S. 165 referred to by the Government involved persons convicted of felonies who had jumped bail and had become fugitives despite

³ With respect to the issue of secrecy in the courtroom at the time of the proceedings on April 8, 1957, no extended reference need be made to the Government's argument (Gov't Br., 46 *et seq.*). The Government concedes at page 48 of its brief that "there were, in fact, no spectators in the courtroom." It would appear from the Government's brief at pages 48 and 49, that the persons present were the Judge, Court attaches, the prosecutor, the grand jury and petitioner and his counsel. Unlike the Assistant United States Attorney, the Government's informant, petitioner's counsel is unable to state whether any members of the public sought admission during the proceedings, as he, along with the Assistant United States Attorney, was otherwise occupied at the counsel table in the proceedings then being conducted in the courtroom. It is not claimed that petitioner's counsel made any request, explicit or otherwise, for the admittance of the public. With reference to the Government's remark that in the circumstances there was "no occasion for the Trial Judge to rule upon the question of secrecy" (Gov't Br., 48), it will suffice to recall the fact that on April 5, 1957 the courtroom was ordered cleared (Gov't Br., 47; R. 6) and that the prosecutor on that day said to the Court that it is the procedure to clear the courtroom (R. 6). The proceeding on April 8th was specifically stated by the prosecutor to be another request for the aid and assistance of the Court with reference to the petitioner (R. 36).

notice and knowledge of a direction by the Court to appear for surrender and to commence the service of sentence. *Hill v. United States ex rel. Weiner*, 300 U. S. 105, cited by the Government, involved a two-year sentence for contempt for the violation of a decree in a suit prosecuted by the United States under the Federal Anti-Trust Act.

Lopiparo v. United States, 216 F. 2d 87, 92 (C.A. 8), (Gov't Br., 52), where there was a sentence of 18 months "or until the further order of this Court", involved the credibility and good faith of a witness who testified that he was unable to find certain books he was ordered to produce. *Warring v. Huff*, 122 F. 2d 641 (App. D. C.) (*ibid*) involved two contempt sentences, each for 13 months, to run consecutively, which were affirmed. It appears from the companion case, *Warring v. Colpoys*, 122 F. 2d 642 (App. D. C.) that the contemnor had pleaded guilty to criminal contempt charges, that he had used money to influence a prospective juror and had investigated the possibility of influencing another prospective juror.

Conley v. United States, 59 F. 2d 929 (C.A. 8) (*ibid*) involved a sentence of two years for criminal contempt arising out of an attempt to "fix" a criminal case and to procure its dismissal for a consideration.

United States v. Lederer, 140 F. 2d 136 (*ibid*, 53) was a violation of an injunction restraining the defendant from selling meat at prices in excess of the OPA maximum price regulation. *Creekmore v. United States*, 237 Fed. 743 (C.A. 8) (*ibid*, 53) involved an attempt to corrupt a trial juror.

Hence the cases cited by the Government on the question of the length of sentence are inappropriate and have no bearing on the question of the sentence properly to be meted out to a contemnor who has refused to answer questions before a grand jury as to a crime for which only a monetary fine may be imposed.

CONCLUSION

For all the reasons stated herein and in petitioner's main brief, the conviction here should be reversed and acquittal directed.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1958

EMANUEL BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

*On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Second Circuit*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

October Term, 1957

No. 356

EMANUEL BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

*On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Second Circuit*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 53-66) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1957. The petition for a writ of certiorari was filed on August 8, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the immunity provision contained in Chapter 8 of Part II of the Interstate Commerce Act (49 U.S.C. 305(d)) applies to a witness before a grand jury investigating possible offenses arising under that chapter, as distinguished from a witness before the administrative agency.

2. Whether, assuming petitioner was protected by the immunity provision, the immunity was coextensive with his privilege against self-incrimination so as to afford him adequate protection.

3. Whether petitioner could summarily be found in contempt for refusal to answer questions put to him in open court after he had disobeyed the court's initial order to return to the grand jury and answer questions relevant to its inquiry and had been brought back and ordered to answer.

4. Whether petitioner's sentence of 15 months imprisonment for criminal contempt was an abuse of the court's discretion or a cruel and unusual punishment.

STATUTES AND RULE INVOLVED

Section 205(d) of the Interstate Commerce Act, as amended, 49 Stat. 550, 54 Stat. 922, 49 U.S.C. 305(d) provides:

So far as may be necessary for the purposes of this chapter, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and re-

quire by subpoena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title; and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, unless otherwise provided in this chapter.

The Act of February 11, 1893, ch. 83, 27 Stat. 443, 49 U.S.C. 46 provides:

No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or

the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than \$100 nor more than \$5,000, or by imprisonment for not more than one year or by both such fine and imprisonment.

18 U.S.C. 401(3) provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

* * * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42(a), F. R. Crim. P., provides:

Criminal Contempt

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

On April 8, 1957, in the United States District Court for the Southern District of New York, Judge Richard H. Levet, acting under the authority of 18 U.S.C. 401(3), and in accordance with Rule 42(a) of the Federal Rules of Criminal Procedure (R. 3, 6), cited petitioner for contempt of court for refusing to answer certain questions in the court's presence. Petitioner was given a sentence of one year and three months imprisonment (R. 4, 6).

○ The contempt citation grew out of the following circumstances:

On April 5, 1957, petitioner appeared pursuant to subpoena to testify as a witness before a grand jury then engaged in investigating alleged violations of Part II of the Interstate Commerce Act, as amended (54 Stat. 919, 49 U.S.C. 301, *et seq.*) (R. 8, 10-11, 22-29). The subpoena directed him to testify as to (R. 23) "all and everything which you may know in regard to an alleged violation of Sections 309, 322, Title 49, United States Code." On the occasion of his appearance before the grand jury, petitioner was accompanied by his attorney who remained in the anteroom during the questioning (R. 23). After being sworn, petitioner was asked: "Mr. Brown, are you associated with Young Tempo, Incorporated?", and he replied, "I refuse to answer because by answering I may tend to incriminate myself" (R. 24).

Petitioner was then advised by the government attorney that the grand jury was conducting an inves-

tigation into possible violations of the Interstate Commerce Act; that under 49 U.S.C. 305(d) Congress had provided that any witness compelled to give testimony as to such matters would, by virtue of his testimony, be given immunity from federal prosecution as to any crime which might arise out of the subject matter of his testimony; that the "granting of immunity is as broad as the constitutional protections which [petitioner] would otherwise have under the Fifth Amendment"; and that as a result of such immunity petitioner had no privilege entitling him to refuse to answer (R. 24-25).¹ The grand jury foreman on request of the government attorney again asked petitioner the same question; whereupon petitioner requested and was given leave to consult his attorney concerning his rights (R. 25). On his return to the grand jury room he was again asked the question and again refused to answer on the ground of self-incrimination (R. 25).

Petitioner was again informed that, under the circumstances previously explained to him (which he said he understood), the privilege was not available to him, and warned that should he persist in his refusal he could be cited in contempt. At this juncture he was again given leave to consult with his attorney, and on his return, after being asked the same question a second time by the foreman, he

¹ On March 25, 1957, eleven days prior to this grand jury appearance, petitioner's attorney, in a conference with government attorneys, was specifically advised of the government's intention to compel petitioner's testimony pursuant to this statutory grant of immunity (R. 9-10, 11-12).

again refused to answer it on the same ground (R. 26-27). He similarly refused to answer on the ground of self-incrimination five other questions (R. 27-29).

The transcript of the grand jury proceedings involving petitioner was read to the court (R. 22-29). In support of his argument that the immunity afforded was not coextensive with the privilege, petitioner's counsel told the court that petitioner had been questioned before two other grand juries, one relating to the Victor Riesel obstruction of justice case, and the other relating to alleged racketeering in the garment trucking industry (R. 32), and that he had claimed the privilege against self-incrimination in those inquiries. He argued that, should he testify in the instant grand jury proceedings, the immunity afforded him would not be sufficient to protect him against the use of his testimony in prosecutions arising out of those other inquiries, or in other collateral proceedings, such as possible violations of the Internal Revenue laws (R. 36-37).

On April 8, 1957, the court ruled that the immunity provisions of the Interstate Commerce Act afforded petitioner complete immunity "from prosecution for all matters on which he is questioned before this grand jury" (R. 46). The court directed him to answer the question before the grand jury (R. 44-45). Later in the afternoon the grand jury returned to the courtroom and through government counsel again requested the assistance of the court with reference to petitioner's continued refusal to answer the questions (R. 47).

On the application of government counsel, the court called petitioner to the stand to ask him the questions which he had refused to answer before the grand jury (R. 51). Petitioner's counsel objected to this procedure on the ground that "the witness is now being asked in a criminal cause to be a witness" (R. 51). The court, noting that the immunity statute protected petitioner, overruled the exception and called petitioner to the stand (R. 51-52). He was asked by the court, in the presence of the grand jury, the questions he had previously refused to answer before the grand jury. In each instance he again refused to answer on the ground that the question tended to incriminate him (R. 53-55). The court asked each question again and he again refused to answer (R. 55-57). Petitioner further stated that if he were returned to the grand jury room he would continue to refuse to answer the questions. (R. 57)

After hearing argument on the legal issues involved (R. 58-60), the court held petitioner in contempt (R. 60). On appeal the judgment was affirmed.

ARGUMENT

1. Petitioner seeks to justify his refusal to answer questions on the ground that, as a witness before a grand jury, he was not within the coverage of the immunity provisions in 49 U.S.C. 305(d) and 46. He argues that the immunity applies only to a witness before the Interstate Commerce Commission itself. The language and history of the statutes refute this contention.

Section 305(d) provides in pertinent part (for full text see pp. 2-3 *supra*):

* * * any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, unless otherwise provided in this chapter.

The relevant portions of Section 46 provide:

No person shall be excused from attending and testifying * * * in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify * * * in any such case or proceeding: * * *

Section 46, which grants immunity in any cause "criminal or otherwise," admittedly applies to grand jury investigations. And Section 305(d), in referring to the "rights, privileges and immunities" as well as the "duties, liabilities, and penalties" of a witness "as though such matter arose under chapter 1," incorporates the same immunity. As the Court of Appeals observed (Pet. App. 59), "the natural meaning of the reference in § 305(d) to § 46 is that whatever is within the scope of the latter is to be incorporated into the former" and therefore "the

immunity applies to grand jury investigations under Chapter 8, the Motor Carrier Act, just as it does to such investigations under Chapter I."

Petitioner argues that since the first clause of Section 305(d), *supra* pp. 2-3, grants investigatory power only to the Commission for "any matter under investigation," the reference in the immunity clause of § 305(d) to "any matter under investigation under this chapter" should be read *in pari materia* with the empowering clause to mean "under investigation under this chapter by the Commission" (Pet. 17). No justification exists for such a limiting construction. The phrase, "any matter under investigation under this chapter," in its natural meaning applies to investigation of possible violations of the chapter punishable under 49 U.S.C. 322. The fact that the first clause of Section 305(d) refers only to the Commission, and does not grant to grand juries investigatory power which they already possess, does not suggest that the immunity provision in the second clause is limited to Commission investigations. On the contrary the legislative history shows that Congress in fact sharply distinguished between the two subdivisions of the subsection, and that the differences in the language of the subdivisions reflect precisely what was intended. The Motor Carrier Act was introduced in Congress in 1935 as S. 1629 (79th Cong., 1st Sess.). On the floor of the House of Representatives, the bill having been favorably reported from committee, two amendments were offered to § 305 (d).² See 79 Cong. Rec. 12232. The last phrase of

² Then § 205(e) of the bill.

the first subdivision of § 305(d), in its original version, read:

“as though such matter arose under Part I,”

This was amended to its present form:

“as the Commission has in a matter arising under Part I³”

However, the parallel language of the second subdivision of § 305(d), which originally read:

“as are provided in Part I,”

was made to read, as it still does:

“as though such matter arose under Part I.”

The changes were accepted by both the House and Senate. 79 Cong. Rec. 12232, 12460. By these amendments, Congress clarified its intent to have the powers granted in the first subdivision of § 305(d) apply to hearings before the Commission, but at the same time reiterated the broad, unqualified scope of the incorporation of § 46 by the second subdivision of § 305(d).

As this Court observed in *Brown v. Walker*, 161 U. S. 591, 594 (recently reaffirmed in *Ullmann v. United States*, 350 U.S. 422, 436-439), Section 46 (enacted in 1893, 27 Stat. 443, when only railroads were covered by the Act) was promulgated for the express purpose of giving complete immunity to witnesses in all proceedings under the Interstate Commerce Act, and to correct the infirmity of the pre-

³ “Part I,” as codified in the United States Code, becomes “Chapter I of this title.”

vious immunity statute which gave only limited immunity (*Counselman v. Hitchcock*, 142 U.S. 547).

It must be assumed that this judicial gloss on Section 46 was carried forward in Section 305(d) when the former was incorporated by reference in the latter. The reenactment of an immunity statute and *a fortiori* its incorporation by reference in another statute "creates a presumption of legislative adoption of previous judicial construction" given that statute. *Shapiro v. United States*, 335 U. S. 1, 20. Section 305(d) is therefore properly read to provide the same immunity to witnesses in all investigations under Chapter 8 of the Interstate Commerce Act as Section 46 extends in investigations under Chapter I. This, of course, includes witnesses before grand juries.

2. Petitioner also argues that, even if Section 305(d) incorporates the immunity granted by Section 46, it grants inadequate protection. He contends that the phrase "in connection with any matter under investigation under this chapter" limits the immunity to offenses arising under the chapter and does not give protection as to collateral crimes. The qualifying phrase is, however, descriptive of the class of witnesses to whom the immunity will attach (*i. e.*, "any person subpoenaed or testifying in connection with any matter under investigation under this chapter"). It does not limit the extent of the immunity granted to such a witness. The immunity is otherwise defined in Section 46 in language of broad import to include "any transaction, matter or thing, concerning which he may testify, or produce evi-

dence, documentary or otherwise." This immunity, which extends to any "transaction, matter or thing" concerning which the witness may testify, is applicable "whenever and in whatever court such prosecution may be had." *Brown v. Walker*, 161 U. S. 591, 608. It protects the witness from future prosecution based on the testimony given and sources of information obtained from the compelled testimony. *Ullmann v. United States*, 350 U.S. 422, 436-437. Petitioner was fully protected by the immunity. He was therefore not entitled to refuse to answer the questions under the claim of privilege.

3. Petitioner argues (Pet. 23-33) that he could not be summarily punished for contempt under Rule 42 (a) since the contempt, if any, was of the grand jury. He argues that the court failed to accord him due process when it put the questions to him and treated the refusal to answer as a contempt in the presence of the court.

The procedure followed has been used many times, where, as here, the only issue is a legal one—whether the witness could properly be required to answer. It is the method by which the court's direction to answer is incorporated in a final judgment which may be reversed on appeal. *Rogers v. United States*, 340 U.S. 367;⁴ *Hale v. Henkel*, 201 U.S. 43; *United States*

⁴ In the *Rogers* case, petitioner refused to answer the questions of a grand jury and was brought before the district court which committed her to the custody of the marshal pending her hearing the next day relative to her reasons for refusing to answer. The next day on her representation that she would purge herself, she was allowed to return to the grand jury room where she again refused to

v. *Curcio*, 234 F. 2d 470, 483 (C.A. 2), reversed on other grounds, 354 U.S. 118; *United States v. Weinberg*, 65 F. 2d 394, 395 (C.A. 2), certiorari denied, 290 U.S. 675. The power to compel the attendance of witnesses before grand juries has always been vested in the court of which the grand jury is an arm. This power carries with it the correlative power to ascertain whether its process is being complied with and to issue further orders to compel obedience. To that end the witness may, on his first refusal before the grand jury, be brought before the court and may be made to return to the grand jury to answer the questions. On his further refusal, the court may treat the second refusal before the grand jury as a disobedience to the court's order outside of the presence of the judge, in which event, the contempt of the court's authority must be prosecuted on notice under Rule 42 (b), F. R. Crim. P., since the acts constituting the contempt have not been seen or heard by him in the first instance. But where the judge in the exercise of his ancillary power in aid of the grand jury elects to make a further order to

answer the questions. The court then asked her if she still persisted in her refusal, and when she said she did, held her in criminal contempt under the summary disposition procedures. Although the issue of the validity of these procedures was raised before this Court (see Pet. Br. Nos. 20, 21, 22, O.T. 1950, pp. 54-58; Br. for United States, *Ibid.*, pp. 51-53), this Court ruled that the privilege was not available to Rogers and sustained the conviction, thus in effect overruling her contentions of procedural unfairness. A petition for rehearing which complained of the Court's silence on the procedural issue (Pet. for Rehearing, No. 20, O.T. 1950, pp. 6-10) was denied (341 U.S. 912).

the witness in open court and before the grand jury to answer the questions, and the witness refuses, and states that he will persist in his refusal (see R. 57), he may treat this disobedience to this final order in the presence of the court as the basis of the contempt under the summary procedures provided for by Rule 42 (a), F. R. Crim. P. See: *Cooke v. United States*, 267 U.S. 517, 534-537. Petitioner, at every stage, was given full opportunity to present any argument he could muster. He therefore had full opportunity to defend himself.⁵

Petitioner's further contention (Pet. 29-31) that he had an absolute right as a defendant in a contempt proceeding against taking the stand, when, after disobeying the court's order to testify before the grand jury on the second occasion he was brought again

⁵The cases which petitioner contends are in conflict with the decision below (*Carlson v. United States*, 209 F. 2d 209 (C.A. 1); *Wong Gim Ying v. United States*, 231 F. 2d 776 (C.A. D.C.)) are both clearly distinguishable. The contempt citation in the *Carlson* case was based on a refusal to answer questions before a grand jury without an intervening court hearing to determine the witness's legal obligation to answer, followed by a disobedience to the court's order. In *Wong Gim Ying*, after refusing to answer the grand jury questions, the court made no order directing the appellant to return to the grand jury room to answer the questions, as in the case at bar, but after considering and overruling her claim of privilege, adjudged her in contempt forthwith under summary procedures. Neither case suggests that, after an initial disobedience to the court's order to return to the grand jury room and answer the questions, the court cannot then order the witness to answer the questions in open court in the presence of the grand jury and summarily hold him in contempt on his refusal to obey such final order.

into court, similarly misconceives the basis of the court's contempt citation. While his disobedience of the court's order to return and testify might have been made the basis of a contempt citation, the court chose not to regard the contempt as complete. It gave him the opportunity to purge himself and answer the questions in open court. He was not therefore in the status of a defendant until after he had again refused to give the answers demanded.⁶

4. Finally, petitioner contends that his sentence of 15 months imprisonment violated the guarantee against cruel and unusual punishment, and constituted an abuse of the court's discretion (Pet. 31-33). As the Court of Appeals observed (Pet. App. 65-66), it is by no means extraordinary in its severity as

⁶ Petitioner includes as one of the questions presented for review (Pet. 3) "[w]hether the secrecy of the proceedings violated the requirement that a contempt judgment be public", although he does not pursue this issue in his argument. The record indicates that on the morning of April 5, 1957, prior to hearing the legal argument relative to petitioner's claim of privilege, Judge Levet ordered the courtroom cleared of all but the interested parties. Petitioner made no objection (R. 7). During this morning "colloquy," no testimony was taken on the application to the court to compel petitioner to answer the questions and there is no showing that a similar procedure was followed in the afternoon or in any of the court appearances thereafter. In any event these April 5th proceedings which culminated only in the court's order directing petitioner to return to the grand jury room could in no sense be considered a contempt proceeding since the contempt did not arise until April 8, 1957. The conclusions of the court below that petitioner had no standing to raise this point for the first time on appeal, and that in any event it was without merit, are therefore amply justified (Pet. App. 64-65).

compared to other contempt cases. *E.g.*, *Hill v. United States ex rel. Weiner*, 300 U.S. 105, 106; *Lopiparo v. United States*, 216 F. 2d 87, 92 (C.A. 8), certiorari denied, 348 U.S. 916; *Warring v. Huff*, 122 F. 2d 641 (C.A. D.C.), certiorari denied, 314 U.S. 678; *Conley v. United States*, 59 F. 2d 929 (C.A. 8). The court evidently regarded petitioner's contentions as motivated by a desire to obstruct the investigation (see statement by government counsel, R. 60-62). The sentence was neither an abuse of judicial discretion nor cruel or unusual. Cf. *United States ex rel. Brown v. Lederer*, 140 F. 2d 136, 138-139 (C.A. 7), certiorari denied, 322 U.S. 734; *Creekmore v. United States*, 237 Fed. 743, 754-755 (C.A. 8).

Petitioner asserts (Pet. 32) that "two of the questions involved" in this case are presently before the Court *sub judice* in *United States v. Green*, 241 F. 2d 631 (C.A. 2), certiorari granted, 353 U.S. 972, No. 100, this Term, a case involving, *inter alia*, the legality of a sentence of three years imposed on those petitioners, who, having been convicted under the Smith Act, failed to appear for surrender to the United States Marshal in accordance with an order of a federal district court. While it is apparent that the instant case involving the imposition of a 15-month sentence is factually distinguishable, it is true that one of Green's arguments raised before this Court (see Petition, *United States v. Green*, No. 100, this Term) is that 18 U.S.C. 401 incorporates by implication a sentence limitation of one year's imprisonment.

Nevertheless, we respectfully submit that there is no necessity to withhold action on the instant petition pending a decision in *Green* since the question, however resolved, does not go to the validity of petitioner's conviction. Petitioner was granted bail pending appeal and the Court of Appeals has stayed its mandate pending disposition in this Court. (Pet. 1) If the instant petition is denied, petitioner would have ample opportunity to make application to the district court under Rule 35, F. R. Crim. P., for correction of his sentence "at any time" should this Court's opinion in the *Green* case determine that any contempt sentence in excess of one year is illegal.⁷

⁷ On the assumption that the 15-month sentence was intended by the court to be coercive rather than punitive, petitioner argues that it was incumbent on the court to provide a purge clause in the sentence. The sentence indicates however that the court considered petitioner's refusal to be obstructive and that the court intended to punish petitioner for his flouting of the authority of the court. The contempt was criminal. *United States v. United Mine Workers of America*, 330 U.S. 258, 296-300; *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-445; *Parker v. United States*, 153 F. 2d 66, 70-71 (C.A. 1). While the court might have included a purge provision in the sentence in addition to the criminal punishment (cf. *Grant v. United States*, 227 U.S. 74, 78; *Lopiparo v. United States*, 216 F. 2d 87, 91 (C.A. 8), certiorari denied, 348 U.S. 916; *Ibid.*, 222 F. 2d 897 (C.A. 8); *United States v. Curcio*, *supra*, (234 F. 2d 470 (C.A. 2)), its failure to do so did not invalidate the sentence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied..

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No. 4

In the Supreme Court of the United States

OCTOBER TERM, 1958

EMANUEL BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 4

EMANUEL BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 52-63) is reported at 247 F. 2d 332.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1957. The petition for a writ of certiorari was filed on August 8, 1957, and was granted on April 7, 1958 (356 U. S. 926). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the immunity provision contained in Chapter 8 of Part II of the Interstate Commerce Act (49 U. S. C. 305 (d)) applies to a witness before

a grand jury investigating possible offenses arising under that chapter, as distinguished from a witness before the administrative agency itself.

2. Whether, assuming petitioner was protected by the immunity provision, the immunity was coextensive with his privilege against self-incrimination so as to afford him adequate protection.

3. Whether petitioner could summarily be found in contempt for refusal to answer questions put to him by the trial judge in the presence of the grand jury after petitioner had disobeyed the court's initial order to return to the grand jury room and answer questions relevant to the inquiry and had been again brought before the court and ordered to answer.

4. Whether petitioner's sentence of 15 months imprisonment for criminal contempt was an abuse of the court's discretion or a cruel and unusual punishment.

STATUTES AND RULE INVOLVED

Section 205 (e) of the Interstate Commerce Act, as amended, 49 Stat. 550, 54 Stat. 922, 49 U. S. C. 305 (d), provides (as it appears in the United States Code):

So far as may be necessary for the purposes of this chapter, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpoena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising

3

under chapter 1 of this title [*i. e.*, Part I of the Interstate Commerce Act]; and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title [*i. e.*, Part I of the Interstate Commerce Act], unless otherwise provided in this chapter.

The Act of February 11, 1893, ch. 83, 27 Stat. 443, 49 U S. C. 46, provides:

No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty of forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any per-

son who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than \$100 nor more than \$5,000, or by imprisonment for not more than one year or by both such fine and imprisonment.

The Act of February 25, 1903, c. 755, 32 Stat. 904, 49 U. S. C. 47, provides:

No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under chapter 1 of this title or any law amendatory thereof or supplemental thereto: *Provided*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

18 U. S. C. 401 (3) provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

* * * * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42 (a), F. R. Crim. P., provides:

Criminal Contempt

(a) *Summary Disposition*. A criminal contempt may be punished summarily if the judge

certifies, that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

On April 8, 1957, in the United States District Court for the Southern District of New York, Judge Richard H. Levet, acting under the authority of 18 U. S. C. 401 (3), *supra*, and in accordance with Rule 42 (a) of the Federal Rules of Criminal Procedure (R. 4-5), *supra*, p. 4, cited petitioner for contempt of court for refusing to answer certain questions in the court's presence. Petitioner was given a sentence of one year and three months imprisonment (R. 3-4, 49).

The contempt citation grew out of the following circumstances:

On April 5, 1957, petitioner appeared pursuant to subpoena to testify as a witness before a grand jury then engaged in investigating alleged violations of Part II of the Interstate Commerce Act, as amended (54 Stat. 919, 49 U. S. C. 301, *et seq.*) (R. 6-9, 17-23). The subpoena directed him to testify as to (R. 19) "all and everything which you may know in regard to an alleged violation of Sections 309, 322, Title 49, United States Code." On the occasion of his appearance before the grand jury, petitioner was accompanied by his attorney who remained in the anteroom during the questioning (R. 18). After being sworn, petitioner was asked: "Mr. Brown, are you associ-

ated with Young Tempo, Incorporated?", and he replied, "I refuse to answer because by answering I may tend to incriminate myself" (R. 19).

Petitioner was then advised by the government attorney that the grand jury was conducting an investigation into possible violations of the Interstate Commerce Act; that under 49 U. S. C. 305 (d), *supra*, pp. 2-3, Congress had provided that any witness compelled to give testimony as to such matters would, by virtue of his testimony, be given immunity from federal prosecution as to any crime which might arise out of the subject matter of his testimony; that the "granting of immunity is as broad as the constitutional protections which [petitioner] would otherwise have under the Fifth Amendment"; and that, as a result of such immunity, petitioner had no privilege entitling him to refuse to answer (R. 19-20).¹ The grand jury foreman, on request of the government attorney, again asked petitioner the same question, whereupon petitioner requested and was given leave to consult his attorney concerning his rights (R. 20). On his return to the grand jury room he was again asked the question and again refused to answer on the ground of self-incrimination (R. 20-21).

Petitioner was again informed that, under the circumstances previously explained to him (which he said he understood), the privilege was not available

¹ On March 25, 1957, eleven days prior to his grand jury appearance, petitioner's attorney, in a conference with government attorneys, was specifically advised of the government's intention to compel petitioner's testimony pursuant to this statutory grant of immunity (R. 8, 9-10).

to him, and was warned that should he persist in his refusal he could be cited in contempt. At this juncture he was again given leave to consult with his attorney, and on his return, after being asked the same question a second time by the foreman, he again refused to answer it on the same ground (R. 21-22). He similarly refused to answer on the ground of self-incrimination five other questions (R. 22-23) undisputedly relevant to the grand jury inquiry.

The transcript of the grand jury proceedings involving petitioner was read to the court (R. 17-23). In support of his argument that the immunity afforded was not coextensive with the privilege, petitioner's counsel told the court that petitioner had been questioned before two other grand juries, one relating to the Victor Riesel obstruction-of-justice case, and the other relating to alleged racketeering in the garment trucking industry (R. 26), and that he had claimed the privilege against self-incrimination in those inquiries. He argued that, should petitioner testify in the instant grand jury proceedings, the immunity afforded him would not be sufficient to protect him against the use of his testimony in prosecutions arising out of those other inquiries, or in other collateral proceedings, such as possible violations of the internal revenue laws (R. 28-30).

On April 8, 1957, the court ruled that the immunity provisions of the Interstate Commerce Act afforded petitioner complete immunity "from prosecution for all matters on which he is questioned before this grand jury" (R. 36). The court directed him to answer the questions before the grand jury (R. 35,

36.)² Later in the afternoon, the grand jury returned to the courtroom and through government counsel again requested the assistance of the court with reference to petitioner's continued refusal to answer the questions (R. 36).³ Government counsel explained that (R. 36), "[a]t this point the grand jury is merely requesting the assistance of the Court", but requested that if it appeared from the testimony of the grand jury reporter that petitioner was per-

² The court's ruling appears in the following extract of the record (R. 34-35):

* * * *

"The Court. In this matter I have determined that the witness must testify as to the questions which were propounded. I believe that the statutory sections, particularly Section 305 (d), Title 49, and Section 46 of Title 49, adequately provide for immunity in the instances involved; I believe that the immunity applies to a grand jury, see *Brown v. Walker*, 161 U. S. 59.

"I believe in general that the immunity applies in the State Courts, see *Adams v. Maryland*, 347 U. S. 179.

"The immunity exists even though no privilege is claimed, see *U. S. v. Monia*, 317 U. S. 424.

"The United States Attorney is charged with enforcement of the United States criminal laws and under the Rules of Criminal Procedure I believe that the witness must answer. Therefore I direct this witness, Emanuel Brown, to answer the questions propounded as they were repeated before me on Friday.

"Have I covered everything?

"Mr. WACHTELL. I believe so, your Honor.

"The Court. Then, therefore, the grand jury will retire and the question will be propounded and whatever happens will be taken up from there."

* * * *

³ The record is silent as to whether the courtroom had been cleared on this occasion. This point is discussed *infra* at pp. 49-50.

sisting in his refusal to answer the questions (R. 36-37), "that the Court itself, in the presence of the grand jury, will put the six questions to the witness and ask him, first, whether he is willing to answer them now, and, second, would he answer them if he were sent back to the grand jury again". Government counsel also requested that, if petitioner persisted in his refusal to answer he be held in summary contempt under Rule 42 (a) of the Federal Rules of Criminal Procedure. The grand jury reporter then took the stand and read the transcript of the proceedings before the grand jury (R. 37-40).

On the application of government counsel, the court called petitioner to the stand to ask him the questions which he had refused to answer before the grand jury (R. 40). Petitioner's counsel objected to this procedure on the ground that "the witness is now being asked in a criminal cause to be a witness" (R. 40). The court, noting that the immunity statute protected petitioner, overruled the exception and stated that the proceedings were "a continuance of the grand jury proceeding, before the Court" (R. 40). Petitioner, on being called to the stand, was asked by the court, in the presence of the grand jury, the questions he had previously refused to answer before the grand jury. In each instance he again refused to answer on the ground that the question tended to incriminate him (R. 53-55). The court asked each question a second time and he again refused to answer (R. 55-57). The following then ensued (R. 44-45):

* * * * *

Q. You have declined to answer these questions here before me in this courtroom and be-

fore this grand jury which is here. Do I understand that you will maintain that position and that you will not answer if you are returned to the grand jury room, to answer these questions?

Mr. SHAPIRO. I object, your Honor.

The COURT. Overruled.

Mr. SHAPIRO. Exception.

A. Yes, sir.

Q. And do you believe that these answers will incriminate you?

Mr. SHAPIRO. I object to that question, your Honor.

The COURT. Overruled.

Mr. SHAPIRO. Exception.

Q. Do you believe that the answers to these questions just asked you would incriminate you in any way?

Mr. SHAPIRO. I object to that as wholly improper, your Honor, a violation of his privilege.

The COURT. Overruled.

Mr. SHAPIRO. Exception.

A. I refuse to answer.

* * * * *

The COURT. Very well. By reason of your refusal to answer in the actual presence of this Court, I am forced to act upon this matter.

* * * * *

The court then again heard counsel for both sides on the legal issues involved (R. 45-47). Thereafter, it adjudged petitioner in contempt (R. 47) and imposed sentence (R. 49). On appeal, the judgment was affirmed (R. 64).

SUMMARY OF ARGUMENT

I

The immunity provided in 49 U. S. C. 305 (d), *supra*, pp. 2-3, extends to a witness before a grand jury investigating possible violations of Part II of the Interstate Commerce Act. The statute by its literal terms applies to "any person" subpoenaed in connection "with any matter under investigation under this part". It also confers the same rights and prescribes the same duties "as though such matter arose under [Part I]". Since it had long been settled, before Part II was enacted, that the immunity of Part I applied to grand jury investigations, it is evident that Congress intended to confer the same grant of immunity in Part II. Part II, like Part I, has criminal sanctions.

This construction is reinforced by the structure of the Interstate Commerce Act. Part II and the subsequently enacted Part III of the Act are interrelated parts of legislation designed to establish uniform federal control over the transportation field. The immunity in Part III, like that in Part I, applies to witnesses before grand juries.

The fact that the immunity provision of Section 305 (d) appears as the second clause of that section does not mean that it must be read narrowly as qualified by the first clause which grants investigatory power to the Commission itself, similar to the power which the Commission has in a matter arising under Part I. The first clause was based on Section 12 of the Interstate Commerce Act (as amended) in

Part I, and was necessary to grant investigatory power to a commission which has no inherent authority to investigate. There was no need to mention the already existing investigatory powers of grand juries. The second clause of Section 305 (d)—the immunity provision—adopts by reference other provisions of Part I dealing with immunity, which clearly covered grand jury investigations. Since the two clauses incorporate by reference diverse sections of the original act, each clause should be given its full and independent meaning. The legislative history shows that this was the Congressional intent; that Congress itself sharply distinguished the two subdivisions of Section 305 (d). The settled construction of Part I—i. e., that it is applicable to witnesses before grand juries investigating possible violations of Part I—is therefore properly adopted as the construction of the immunity provision of Part II.

II

The immunity provided by Section 305 (d) is co-extensive with the privilege against self-incrimination and adequately protects the witness. It extends to any transaction, matter or thing concerning which the witness may testify and is applicable whenever and in whatever court such prosecution may be had. It protects the witness from prosecution based on the testimony and information derived from the testimony. Since the immunity conferred by Part I has been held to be adequate to bar reliance on the privilege (*Brown v. Walker*, 161 U. S. 591), the co-extensive immunity in Part II is similarly adequate.

There was no procedural defect in the method by which the contempt was adjudicated. Petitioner was given ample notice and opportunity to be heard. The sole issue was one of law, whether petitioner could validly claim the privilege in the face of the statutory grant of immunity. That issue of law was fully argued on the original request by the grand jury for a court ruling after petitioner had first refused to testify. When the court made its ruling of law, it did not then start proceedings for contempt, but directed petitioner to answer the questions before the grand jury. Petitioner again came before the grand jury and refused to answer. While contempt proceedings could then have been instituted on notice under Rule 42 (b), petitioner was not injured by the fact that the court chose not to regard this refusal as the completed contempt. Rather, the judge gave petitioner still another chance to comply with his ruling by calling petitioner before the court, at which time the judge asked petitioner the questions in the presence of the grand jury. In so doing, the court gave petitioner the same opportunity he would have had, if contempt proceedings had been instituted for the refusal to testify before the grand jury, to reargue his legal contention that he was not required to answer. This procedure, by which the court itself asked the questions after petitioner's refusal before the grand jury to comply with the ruling, afforded petitioner a *locus poenitentiae* before the court was faced with the necessity of finding him in contempt. But when, after

two extended arguments on the only issue involved, the court adhered to its original ruling, nothing more remained to be decided. A summary adjudication and sentence for contempt for refusal to obey the direction of the court at that time was therefore entirely proper and consonant with due process. The procedure followed here is the usual method by which the court's direction to answer is incorporated in a final judgment which may be tested on appeal. *Rogers v. United States*, 340 U. S. 367.

There is no doubt that the court had power itself to put the questions to the witness. The authority to compel the testimony of a witness before the grand jury is a power vested in the court. When petitioner was put on the stand before the court, after his refusal to testify before the grand jury, he was called, not to explain his prior acts of refusal before the grand jury, but to testify as a witness before the grand jury. The proceeding was a continuance of the grand jury investigation before the court. Had petitioner given the answers as requested, no contempt proceedings would have resulted. It was his last act of refusing to answer the questions of the court itself which was the foundation of the contempt. And since that act occurred in the presence of the court, summary adjudication for contempt was proper.

Petitioner's argument that the proceedings were secret was raised for the first time in the Court of Appeals and was properly held to have been made too late. While the record shows that the courtroom was cleared at the time of the argument on the original request for a ruling as to petitioner's obligation to

answer, petitioner's counsel raised no objection to this procedure. This session culminated only in the court's order directing petitioner to return to the jury room and was in no sense a proceeding in contempt.

The record is silent as to whether the courtroom was cleared when petitioner again came before the court after his second refusal to testify before the grand jury. Petitioner asserts that it cannot be "factually disputed" that the courtroom was cleared and we have therefore gone outside the record to ascertain what took place. We are informed that the hearing was conducted in a courtroom usually open to the public at a time when no spectators were present, and that no ruling admitting or barring the public was made or requested. The crucial fact, however, is that petitioner's counsel was present and fully participated in all of the proceedings before the court. Here, unlike the situation where attempts have been made to punish for contempt committed before a one-man judge-grand jury, petitioner's contempt was committed in recorded proceedings at a time when he was represented by counsel.

To the extent that the proceeding was a continuation of the grand jury's inquiry, absence of the public was appropriate and consonant with the usual mode in which a grand jury operates. When the inquiring function of the grand jury ceased by virtue of petitioner's refusal to comply with the court's order, all that remained was for the court to enter an adjudication of contempt and to impose sentence. This was in fact done and immediately made a matter of public record. The procedure followed was, as noted above, essentially designed to accord petitioner a further op-

portunity to comply with the court's ruling, and he has no basis for complaint.

IV

The sentence of imprisonment for one year and three months was not an abuse of discretion. The district court, which has primary responsibility in the matter, manifestly considered that petitioner's refusal to testify was a willful attempt to block the grand jury's investigation. The fact that the penalty provisions of the Motor Carrier Act are less severe is irrelevant since the offenses defined by the statute are different in character from the willful act of keeping pertinent information from a grand jury even though the witness has no basis for a claim of privilege.

ARGUMENT

I

THE IMMUNITY PROVIDED IN 49 U. S. C. 305 (d) APPLIES TO A WITNESS IN A GRAND JURY INVESTIGATION OF POSSIBLE VIOLATIONS OF PART II OF THE INTERSTATE COMMERCE ACT

Petitioner seeks to justify his refusal to answer questions on the ground that, as a witness before a grand jury, he was not within the coverage of the immunity provision of Section 205 (e) of Part II of the Interstate Commerce Act, as amended, 49 U. S. C. 305 (d).⁴ That Section provides as follows (49 U. S. C. 305 (d)):

So far as may be necessary for the purposes of this chapter, the Commission and the members

⁴ Part II of the Interstate Commerce Act is the Motor Carrier Act; Part I of the Interstate Commerce Act deals with railroads.

and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpoena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title [i. e., Part I of the Interstate Commerce Act]; *and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title [i. e., Part I of the Interstate Commerce Act], unless otherwise provided in this chapter.* [Emphasis added.]

Petitioner argues that the italicized immunity provision, which adopts by reference the immunity provisions of Part I of the Interstate Commerce Act, should not be literally interpreted as applying to "*any person subpoenaed or testifying in connection with any matter under investigation under this [part]*" [emphasis added] but must, as a matter of construction, be read together with the first clause of the subsection granting investigatory power to the Interstate Commerce Commission itself. Petitioner would thus read the second clause as meaning "under investigation under this [part] **by the Commission**." The anomalous result of such an interpretation would be that, while the immunity provisions would be available to the Commission in investigating possible violations of Part II of the Interstate Commerce Act, if judicial proceedings were instituted by the Commission to

enforce the sanctions set forth in 49 U. S. C. 322, or if, as in this case, a grand jury undertook such an investigation on its own initiative, no equivalent immunity would be available respecting the testimony of a witness before the grand jury. We submit that petitioner's suggested interpretation is refuted, not only by the language of the provision itself, but also by its functional relationship to other provisions of the Act, and by its history.

A. THE LANGUAGE, CONTEXT AND HISTORY OF 49 U. S. C. 305 (d) DEMONSTRATES ITS PURPOSE TO AFFORD IMMUNITY, SIMILAR TO THAT CONFERRED BY PART I, TO WITNESSES SUBPOENAED OR TESTIFYING IN ANY INVESTIGATION ARISING UNDER PART II OF THE INTERSTATE COMMERCE ACT

1. *The Language.* Section 305 (d), *supra*, pp. 2-3, literally extends immunity to "any person subpoenaed or testifying in connection with any matter under investigation under this part [Part II of the Interstate Commerce Act]", and provides that such person "shall have the same rights, privileges and immunities and be subject to the same duties, liabilities and penalties as though such matter arose under [part I]". This language is not limited to witnesses before the Interstate Commerce Commission itself; it applies to "any person" who is subpoenaed or who testifies "in connection with any matter under investigation under this [part]". The witness is placed in the same position, in relation to an investigation of any matter arising under Part II, as a witness whose testimony is compelled in any equivalent investigation of a matter which "arose under [part I]." The immunity thus attaches, not by virtue of a witness' appearance or testimony before

a particular investigative agency, but because he has been compelled to appear and testify as to a matter arising under Part II of the Interstate Commerce Act.⁵

The fact that the first clause of Section 305 (d) refers only to the Commission, and does not grant to grand juries investigatory power which they already possess, does not suggest that the immunity provision in the second clause is limited to Commission investigations. It would have been completely superfluous to have redefined, for purposes of enforcing the criminal provisions of the Motor Carrier Act (Part II of the Interstate Commerce Act), the scope of the traditional inquisitorial powers of the grand jury, and the absence of any reference to such power in the first clause of Section 305 (d) has no more significance than the absence of such reference in Section 12 of the Act (49 U. S. C. 12, *infra*, pp. 22-23) defining the investigative authority of the Commission under Part I. Logically, the express grant of investigative authority in the first clause was limited to the same authority "as the Commission has in a matter arising under [part 1]" since, unlike the grand jury, the Commission has no inherent authority and its powers must rest on a specific statutory grant. This reference to Commission authority under Part I does not suggest

⁵ It is perhaps significant that the power granted to the Commission in the first clause of Section 305 (d) relates to "witnesses", whereas the immunity granted by the second clause relates to "any person", a broader, more inclusive, category also referred to in the various immunity provisions of Part I of the Interstate Commerce Act (49 U. S. C. 46, 47, and 48). See *United States v. Minker*, 350 U. S. 179, 186-189.

the absence of any investigative authority in grand juries to investigate matters arising under Part II. The Motor Carrier Act, like the original Interstate Commerce Act, contains penalty provisions which can be enforced only through the judicial process (49 U. S. C. 322), and power in the grand jury to investigate is implicit in any such penalty provision.

Nor does the language of the second clause suggest that it relates back or is qualified by the first clause. Aside from the bare fact that the two clauses are separated by a semi-colon, there is no evidence of any Congressional intent that the clauses be read together. The terms of the second clause, extending the same immunity as under the compulsory testimony provisions of Part I to "any person subpoenaed or testifying in connection with any matter under investigation under this [part]" (i. e., the Motor Carrier Act amendment to the Interstate Commerce Act), contain no ambiguity which would justify a narrower reading than the words import. Cf. *United States v. Minker*, 350 U. S. 179, 184-186.

Since investigations under Part II, as in the case of Part I, include, in addition to investigations by the Commission, inquiries by grand juries necessary to determine the criminal liability of persons under the penalty provisions,* it is reasonable to assume that the inclusive language of the second clause was meant

* It is established, as shown in Subpoint B, *infra*, pp. 28-33, that the immunity provisions of Part I of the Act relate to witnesses in grand jury investigations. See *Brown v. Walker*, 161 U. S. 591; *Hale v. Hepkel*, 201 U. S. 43, 66; *Heike v. United States*, 227 U. S. 131; and cf. *United States v. Monia*, 317 U. S. 424.

to be given its natural and logical meaning, *i. e.*, that any person subpoenaed or testifying as to matters arising under Part II is in precisely the same position as though he were testifying as to matters arising under Part I.

2. *The Context.* Even if the literal words of the section were not otherwise clear, there would be no basis for construing the language of Part II of the Interstate Commerce Act to produce a result "plainly at variance with the policy of the legislation as a whole". See *United States v. American Trucking Ass'ns.*, 310 U. S. 534, 542-544. In enacting the Motor Carrier Act as Part II of the Interstate Commerce Act, Congress was extending the authority of the Commission, and other regulatory bodies having jurisdiction under the original Act, to a new subject-matter. It subsequently further extended that authority in the so-called Water Carrier Act, which became Part III of the Interstate Commerce Act. Congress thus created a single body of legislation with interrelated parts designed to promote an integrated and uniform control system over that part of the transportation field subject to federal control. See Sections 1 and 16 of the Act of September 18, 1940, 54 Stat. 899, 919; *United States v. Pennsylvania R. Co.*, 323 U. S. 612, 616-617; *American Trucking Ass'ns. v. United States*, 101 F.

¹ There, this Court said (323 U. S. at pp. 616-617):

"The 1940 Transportation Act is divided into three parts, the first relating to railroads, the second to motor vehicles, and the third to water carriers. That Act, as had each previous amendment of the original 1887 Act, expanded the scope of regulation in this field and correlatively broadened the Commission's

Supp. 710, 720-721 (N. D. Ala.): In framing the new provisions of the supplementary legislation, Congress found it expedient to adopt or incorporate by reference many provisions of Part I of the Interstate Commerce Act. The references in the supplemental legislation, of course, derive meaning from the text of the original provisions of the parent legislation which they incorporate.

The first clause of Section 305 (d) incorporates by reference the provisions of Section 12 of the Interstate Commerce Act, as amended,* which defines the

powers. The interrelationship of the three parts of the Act was made manifest by its declaration of a 'national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each.' The declared objective was that of 'developing, coordinating, and preserving a national transportation system by water, highway, and rail, * * * adequate to meet the needs of the commerce of the United States * * *.' Congress further admonished that 'all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.' 54 Stat. 899."

* Section 12 now provides (49 U. S. C. 12):

"(1) The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this chapter, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to

investigative authority of the Interstate Commerce Commission." In so doing it equates the investigative authority of the Commission in respect to both parts of the Commerce Act.

The second clause of Section 305 (d), on the other hand, adopts by reference other provisions of the Interstate Commerce Act, unrelated to the subject matter of Section 12, and dealing exclusively with the subject of the immunities of witnesses. These Part I provisions (adopted by the second clause of Section 305 (d) of the Motor Carrier Act) provide that any "person" testifying in a Part I investigation is entitled to immunity if he testifies in a civil enforcement proceeding (49 U. S. C. 43), or "in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of [part I]" (49 U. S. C. 46; *supra*, pp. 3-4), or "in any proceeding, suit, or prosecution under [part 1] or any law amendatory

Congress from time to time such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. The Commission is authorized and required to execute and enforce the provisions of this chapter; and, upon the request of the Commission, it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this chapter the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation."

thereof or supplemental thereto * * * (49 U. S. C. 47, *supra*, p. 4).

Since the two clauses of Section 305 (d) relate to different subject matters, and each incorporates by reference diverse sections of the original Act which themselves are unrelated both textually and historically, it is apparent that Congress intended each clause of Section 305 (d) to be given its full and independent meaning on the basis of its own parentage.

3. *The Legislative History.* The legislative history of Section 305 (d) shows that Congress in fact sharply distinguished between the two subdivisions of the subsection, and that the differences in the language of the subdivisions reflect precisely what was intended. The Motor Carrier Act was introduced in Congress in 1935 as S. 1629 (74th Cong., 1st Sess.). On the floor of the House of Representatives, the bill having been favorably reported from committee, two amendments were offered to Section 305 (d). See 79 Cong. Rec. 12232. The last phrase of the first subdivision of Section 305 (d), in its original version, read:

as though such matter arose under Part I.

This was amended to its present form:

as *the Commission* has in a matter arising under Part I. [Emphasis added.]

However, the parallel language of the second subdivision of Section 305 (d), which originally read:

as are provided in Part I,

was made to read, as it still does:

as though *such matter* arose under Part I. [Emphasis added.]

The changes were accepted by both the House and Senate. 79 Cong. Rec. 12232, 12460. By these amendments, Congress clarified its intent to have the powers granted in the first subdivision of Section 305 (d) apply to hearings before the Commission, but at the same time made it even more explicit that what is determinative of the applicability of the second clause of Section 305 (d) is the origin of the "matter", not the nature of the investigating body.

The device of employing one subsection as a catch-all provision to incorporate by reference various provisions of another act is by no means unusual, and is particularly useful where, as in the Interstate Commerce Act, an original body of law is being supplemented by new provisions. It was entirely appropriate, therefore, for Congress, in carrying forward provisions of Part I of the Interstate Commerce Act into Part II, to employ this device. The joinder of both clauses in a single subparagraph of Part II of the Interstate Commerce Act accomplishes the same purpose as the counterpart provision (Section 916 (a) (316 (a)) in Part III (water carriers) of the same Act, in which it is provided (Sec. 316 (a), as added by Sec. 201 of the Act of September 18, 1940, 54 Stat. 929, 946, 49 U. S. C. 916 (a)) that:

The provisions of section 12 and section 17 of part I, and the Compulsory Testimony Act (27 Stat. 443), and the Immunity of Witnesses Act (34 Stat. 798; 32 Stat. 904, ch. 755, sec. 1), shall apply with full force and effect in the administration and enforcement of this part.

Although enacted five years after Part II, Part III (water carriers) is part of a broad revision of the entire Interstate Commerce Act bringing its provisions under one uniform policy of administration (54 Stat. 899, 919), and reflects a Congressional understanding that Section 305 (d) is for Part II, the equivalent of Section 916 (a) in respect to Part III.**

Petitioner's attempt to restrict the broadly drawn immunity provisions of the second clause of Section 305 (d) to Commission investigations, dealt with in the first clause, thus has no support. Whatever significance the fact that statutory provisions are placed within a single subsection may have for construction problems involving other statutes, it is clear that Congress here intended the broad language of the second clause to be applied as literally written, and as applied in Parts I, III, and IV of the same Act to which it is *in pari materia*.

Petitioner argues, however, that other immunity provisions have specifically limited the immunity granted to witnesses appearing before the administrative agency itself, and that Section 305 (d) should be similarly construed in the absence of special language making it applicable to all kinds of investigations arising under Part II of the Interstate Commerce Act. The short answer to this argument is that, as we have shown, in making the Part I immunities available to "any person subpoenaed or testifying in connection with any matter under investigation under this part,"

** See, also, the immunity provision of Part IV (freight forwarders) of the Interstate Commerce Act, Section 417 (49 U. S. C. 1017).

Congress undoubtedly felt that it was adequately framing a provision which would be applicable to any "investigation under this [part]" (including its penalty provisions) without specifying that the immunity would be available in grand jury proceedings. Since Congress was borrowing provisions from another part of the same Act, it would hardly seem necessary to recapitulate all of the language of the original provisions in order to incorporate them into the supplementary legislation. The most accurate index of Congressional intent is not the manner in which Congress has provided for witness immunity in unrelated statutes, but the manner in which it has drafted cognate immunity provisions in other parts of the same Act. These evidence an intent that Section 305 (d) apply to all investigations, including grand jury investigations, of matters arising under Part II of the Act.

The immunity formula as worked out in the 1893 law and as sustained in *Brown v. Walker*, 161 U. S. 591, has been widely adopted in federal legislation with certain modifications to suit the scheme of the particular legislation. Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 Geo. Wash. L. R. 447, 466.⁹ In a few instances the immunity provision is

⁹ For a list of such statutes see 8 Wigmore, *Evidence*, § 2281, fn. 11 (3d ed. and 1957 Pocket Supp.); *Shapiro v. United States*, 335 U. S. 1, 6-7, fn. 4, and see *Ullman v. United States*, 350 U. S. 422, 438.

in terms specifically restricted to proceedings before the administrative agency (*e. g.*, Perishable Agricultural Commodities Act, 7 U. S. C. 499 m (f); Federal Trade Commission Act, 15 U. S. C. 49); in others, it is patently applicable either in administrative proceedings or in any cause or proceeding, criminal or otherwise, under the statute, including grand jury proceedings (*e. g.*, Civil Aeronautics Act, 49 U. S. C. 644 (i); Federal Communications Act, 47 U. S. C. 409 (d); Defense Production Act of 1950, 50 U. S. C. App. 2155 (b); Shipping Act, 46 U. S. C. 827).¹⁰ In many other instances federal statutes merely adopt the basic Compulsory Testimony Act (of Part I of the Commerce Act) by reference. *E. g.*, the so-called Water Carriers Act, 49 U. S. C. 901, 916 (a), and Freight Forwarders Act, 49 U. S. C. 1001, 1017 (Parts III and IV, respectively, of the Interstate Commerce Act); the Commodity Exchange Act, 7 U. S. C. 15.

For the reasons we have set forth, Section 305 (d) is clearly a provision of the latter category, intended to incorporate *in toto* the provisions of the Compulsory Testimony Act of Part I, into Part II. Regardless of the evolution of other immunity statutes which are specifically limited to proceedings before the regulatory agency—and other acts which vary the basic formula of the Interstate Commerce Act—the provision here is properly construed as co-extensive with the immunity provisions of Part I.

¹⁰ See also Sec. 30 of the National Prohibition Act, October 28, 1919, 41 Stat. 317, 27 U. S. C. (1926 ed.) 47; *United States v. Weinberg*, 65 F. 2d 394 (C. A. 2), certiorari denied, 290 U. S. 675; *United States v. Goldman*, 28 F. 2d 424, 432-434 (D. Conn.); *United States v. Moore*, 15 F. 2d 593 (D. Oregon).

B. SINCE THE IMMUNITY CONFERRED BY PART II IS COEXTENSIVE WITH THAT CONFERRED BY PART I, IT PROPERLY APPLIES TO GRAND JURY INVESTIGATIONS

On the view we have just urged, the meaning of Section 305 (d) need not be considered as an abstract or original proposition since, being a reenactment for purposes of Part II of the Interstate Commerce Act of the basic immunity provisions of Part I, it presumably adopts the judicial construction of the parent legislation. *Shapiro v. United States*, 335 U. S. 1, 20. This presumption is particularly warranted in this case since the immunity formula of Part I of the Interstate Commerce Act which Section 305 (d) adopts by reference, had, prior to 1935, been firmly settled in meaning by various opinions of this Court. The formula had been judicially approved on the basis that the protection afforded the witness was coextensive with his privilege against self-incrimination in every respect, and it had been construed to be applicable, not only in administrative, but also in grand jury, proceedings arising under the Interstate Commerce and Sherman Acts. See *Ullmann v. United States*, 350 U. S. 422, 436-439. The judicial history which is a gloss on Section 305 (d) may be summarized as follows:

The original immunity statute enacted in 1868 (15 Stat. 37) was a general provision providing that no evidence "obtained by means of any judicial proceeding from any party or witness * * * shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the

United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture * * *." This provision was successfully challenged in *Counselman v. Hitchcock*, 142 U. S. 547, in proceedings arising out of a grand jury investigation of possible criminal violations of the Interstate Commerce Act. There the witness who had claimed the privilege as to questions asked before the grand jury contended that the immunity provision was not sufficiently broad to immunize him from the effects of his testimony. This Court, in sustaining Counselman's position, held the immunity provision invalid because it (142 U. S. at p. 564) "would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding * * *." The Court also rejected the contention that the privilege could be raised only in a criminal trial, holding that it was available as to any questions tending to show the witness had committed a crime.

Thereafter, in order to meet the infirmity of the prior legislation, Congress enacted the Compulsory Testimony Act of 1893 (27 Stat. 443, 49 U. S. C. 46, *supra*, pp. 3-4), the prototype of federal immunity legislation.¹¹ This Act provided that no person would be excused from attending and testifying

¹¹ The Act was entitled "An act in relation to testimony before the Interstate Commerce Commission, and in cases or proceedings under or connected with an act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and amendments thereto." 27 Stat. 443.

before the Interstate Commerce Commission "or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled, 'An act to regulate commerce' * * *"; but also provided:

* * * But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Two years later, in 1895, again in respect to a refusal to testify before a grand jury concerning an alleged rate violation under the Interstate Commerce Act, this Court in *Brown v. Walker*, 161 U. S. 591, held that the immunity provision of the 1893 statute "sufficiently satisfies the constitutional guarantee of protection." And see *Ullmann v. United States*, *supra* (350 U. S. at pp. 436-439); *United States v. James*, 60 Fed. 257, 260 (N. D. Ill., 1894).

In February 1903, Congress provided for immunity in three additional measures: (1) the Act of February 14, 1903, 32 Stat. 828, establishing the Department of Commerce and Labor and conferring upon the Commissioner of Corporations the investigatory powers possessed by the Interstate Commerce Act; (2) the Elkins Amendment of February 19, 1903, 32 Stat. 848, 49 U. S. C. 43, to the Interstate Commerce

Act; and (3) the Act of February 25, 1903, 32 Stat. 903-904, 49 U. S. C. 47, 15 U. S. C. 32, appropriating monies for the enforcement of the Interstate Commerce Act, the Sherman Act, and other enactments. In *Hale v. Henkel*, 201 U. S. 43, 66, this Court held that a grand jury inquiry was a "proceeding" within the meaning of the proviso to the Act of February 25, 1903 (49 U. S. C. 47, *supra*, p. 4); apparently in order to ratify this interpretation, Congress subsequently provided in Section 9 of the Act of June 29, 1906, 34 Stat. 584, 595:

That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the Act to regulate commerce and all Acts amendatory thereof shall apply to any and all proceedings and hearings under this Act.

And in the Act of June 30, 1906, 34 Stat. 798, 49 U. S. C. 48, Congress provided that the immunity provisions of 49 U. S. C. 43, 46, and 47, would "extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."¹²

It thus seems clear that the immunity provisions of the Interstate Commerce Act were intended to secure the testimony of witnesses before grand juries investi-

¹² Subsequent cases deemed the Compulsory Testimony Act to be broadly applicable in respect to individual witnesses called to testify in grand jury investigations under the Sherman Act. *Heike v. United States*, 227 U. S. 131; *United States v. Monia*, 317 U. S. 424; and see *United States v. Greater Kansas City Retail Coal Merchants' Ass'n.*, 85 F. Supp. 503, 513-514 (W. D. Mo.); see Dixon, "The Fifth Amendment and Federal Immunity Statutes," 22 Geo. Wash. L. R. 447.

gating criminal matters arising under that Act "as aids in the enforcement of criminal justice". *United States v. Monia*, 317 U. S. 424, (diss. op. of Mr. Justice Frankfurter); Dixon, *op. cit.*, 22 Geo. Wash. L. R. at p. 463. During the one hundred years that federal immunity statutes have been in existence (see *ibid.* at pp. 449-454), their purpose has been to exchange an immunity for what otherwise would be incriminating evidence. The maximum utility of the immunity provisions in the Interstate Commerce Act is reached when the investigation of activities of persons subject to the Act are being investigated for possible violations of its penalty provisions—a function shared by the Commission (at least in the first instance) and grand juries.

II

SECTION 305 (d) ADEQUATELY PROTECTS THE WITNESS

Petitioner argues (Pet. Br. 19-22) that, even if Section 305 (d) incorporates the immunity granted by Section 46 of Part I, it grants inadequate protection. He contends that the phrase "in connection with any matter under investigation under this [part]" limits the immunity to offenses arising under the part and does not give protection as to collateral crimes. The qualifying phrase is, however, descriptive of the class of witnesses to whom the immunity will attach (*i. e.*, "any person subpoenaed or testifying in connection with any matter under investigation under this [part]"). It does not limit the extent of the immunity granted to such a witness. The immunity is otherwise defined in Section 46 in language of broad import to include

“any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise.” This immunity, which extends to any “transaction, matter or thing” concerning which the witness may testify, is applicable “whenever and in whatever court such prosecution may be had.” *Brown v. Walker*, 161 U. S. 591, 608. It protects the witness from future prosecution based on the testimony given and sources of information obtained from the compelled testimony.

Under our interpretation of Section 305 (d) as incorporating *in toto* the immunity features of Part I, there can be no question but that the protection granted in every respect is as broad as the privilege against self-incrimination which would otherwise be available—an issue resolved in *Brown v. Walker*, *supra*, the holding of which was recently reaffirmed in *Ullmann v. United States*, 350 U. S. 422, 436–439. As this Court noted in *Ullmann*, the immunity provisions of Part I of the Interstate Commerce Act sustained as sufficient protection to the witness in *Brown v. Walker*, *supra*, have (350 U. S. at p. 438) “become part of our constitutional fabric”. The *Ullmann* decision disposes of petitioner’s assertion that the Part I immunities even if incorporated into Section 305 (d) are not co-extensive with the privilege against self-incrimination.

The immunity accorded petitioner would protect him, not only from the use of his testimony either in proceedings under the Motor Carriers Act and any other proceeding involving a matter arising under that Act, but from use of information or leads obtained from

the compelled testimony. In short, since the "Immunity displaces the danger" petitioner's privilege of silence ceases. *Ullmann v. United States, supra* (350 U. S. at p. 439).

III

THE PROCEDURE FOLLOWED IN THIS CASE COMPORTS WITH DUE PROCESS

A. PETITIONER WAS GIVEN AMPLE NOTICE AND OPPORTUNITY TO BE HEARD

Petitioner argues that, if he was guilty of contempt at all, it was committed before the grand jury after he had been directed by the court to answer, and that the court violated his procedural rights when it called him before it, and gave him another opportunity to answer the questions, before adjudicating him in contempt. Thus, petitioner contends that since the contempt, if any, took place before the grand jury and not in the presence of the court the proceedings should have been on notice pursuant to Rule 42 (b) of the Federal Rules of Criminal Procedure. We submit, however, that when the court itself asked the questions in the presence of the grand jury and petitioner refused to respond, stating that he would continue in his refusal if returned to the grand jury room, there was contempt committed in the presence of the court, and that the summary procedure permitted by Rule 42 (a) was therefore proper.

The argument that the procedure followed in this case deprived petitioner of his rights is without merit. The sole issue involved in the case was one of law—whether petitioner could validly claim the privilege in the face of the statutory grant of immunity. There

were no factual issues to be resolved. On the issue of law, petitioner had more than ample notice and more than ample opportunity to argue his position. He was told at his first appearance before the grand jury on April 5, 1957, that, if he persisted in his refusal to answer in the face of the statutory immunity, he was subject to contempt proceedings.¹³ Thereafter, the issue as to whether the statutory grant of immunity applied to petitioner was fully argued before the district court. On April 8, 1957, the court made its initial and basic ruling on that question of law, ruling that the statute did afford petitioner complete immunity (R. 34-35).

All the procedures thereafter had the effect of giving petitioner a chance to comply with the court's direction before the ruling was embodied in a final order. After the court made its ruling on the issue of law, petitioner was directed to answer the questions before the grand jury. When he refused to do so before the grand jury, the grand jury requested the assistance of the court. The court then gave petitioner still another chance to answer in the presence of the court and of the grand jury. At this time also, the court gave petitioner still another opportunity to argue his legal position that the immunity did not apply (R. 41-47). But when, after two extended arguments on the only issue involved, the court adhered to its original ruling, and petitioner adhered to his refusal to accept such

¹³ Actually, even before that time, petitioner's attorney had been advised of the government's intention to compel petitioner's testimony under the statutory grant of immunity. See fn. 1, *supra*, p. 6.

ruling, nothing more remained to be decided. A summary adjudication for contempt for refusal to obey the direction of the court and imposition of sentence were therefore entirely proper and consonant with due process. The procedure followed here is the usual method by which the court's direction to answer is incorporated in a final judgment which may be tested on appeal. *Rogers v. United States*, 340 U. S. 367; "*Wilson v. United States*, 221 U. S. 361; *Hale v. Henkel*, 201 U. S. 43; *United States v. Curcio*, 234 F. 2d 470, 483 (C. A. 2), reversed on other grounds, 354 U. S. 118; *Lopiparo v. United States*, 216 F. 2d 87 (C. A. 8); certiorari denied, 348 U. S. 916; *United States v. Weinberg*, 65 F. 2d 394, 396 (C. A. 2), certiorari denied, 290 U. S. 675. The federal law in this respect follows the common law. *People ex rel. Phelps v. Fancher*, 4 Thompson & Cook 467 (N. Y., 1874);

¹⁴ In the *Rogers* case, petitioner refused to answer the questions of a grand jury and was brought before the district court which committed her to the custody of the marshal pending her hearing the next day relative to her reasons for refusing to answer. The next day, on her representation that she would purge herself, she was allowed to return to the grand jury room where she again refused to answer questions. The court then asked her if she still persisted in her refusal, and when she said she did, held her in criminal contempt under the summary disposition procedures. Although the issue of the validity of these procedures was raised before this Court (see Pet. Br. Nos. 20, 21, 22, O. T. 1950, pp. 54-58; Br. for United States, *Ibid.*, pp. 51-53), the Court ruled that the privilege was not available to Rogers and sustained the conviction, thus in effect overruling her contentions of procedural unfairness. A petition for rehearing which complained of the Court's silence on the procedural issue (Pet. for Rehearing, No. 20, O. T. 1950, pp. 6-10) was denied (341 U. S. 912).

People ex rel. Hackley v. Kelly, 24 N. Y. 74, 79-80 (1861); *In re Belle Harris*, 4 Utah 5, 8-9 (1884).

Traditionally, the grand jury has been regarded as an "appendage"¹³ of the court, and while independent of the court in many respects, it is totally dependent on the court in compelling the testimony of witnesses. The process by which a witness is compelled to attend and testify is that of the court, and "if, after appearing he refuses to testify, the power, as well as the duty, to compel him to give testimony is vested in the court, and not in the grand jury." *Wilson v. United States*, 77 F. 2d 236, 242 (C. A. 8); *In re National Window Glass Workers*, 287 Fed. 219, 225 (N. D. Ohio); *United States v. Hill*, 1 Brock (Fed. Cas.) 156, 160; *Commonwealth v. Bannon*, 97 Mass. 214, 219. See, also, *In re Oliver*, 333 U. S. 257, 277-278.

On the refusal of a witness to answer questions, the grand jury takes him before the court for the dual purpose of obtaining (1) a ruling on his obligation to testify, and (2) a further appropriate order of the court to insure prompt compliance. *Carlson v. United States*, 209 F. 2d 209, 215-217 (C. A. 1); *Heard v. Pierce*, 62 Mass. 338, 342-345; and see Edwards, *Grand Jury* (1906), p. 133. At that juncture, when the court makes its ruling (here on the availability of the privilege) the witness has as yet committed no contempt, and (as in the case at bar) the court would normally instruct the witness to go back to the grand jury and answer the questions (*Wong*

¹³ See *United States v. Daohis*, 36 F. 2d 601 (S. D. N. Y.); Rapalje, *Contempts* (1890) p. 83.

Gim Ying v. United States, 231 F. 2d 776 (C. A. D. C.)). An adamant refusal so to do by the witness in open court would constitute a contempt. The rule applicable in federal courts is stated in *Carlson v. United States*, 209 F. 2d 209, 216 (C. A. 1):

What ensues when a court is called upon not to punish a completed contempt, but merely to rule on the availability of the privilege? If the court rules that the privilege was properly invoked, that is an end of the matter. If, on the other hand, the court rules (we assume correctly, and after the necessary hearing) that the privilege was not available under the circumstances, the court would then normally instruct the witness to go back to the grand jury and answer the question. If the witness then and there, in the face of the court, declines to do so, this is disobedience to a lawful order of the court, under 18 U. S. C. § 401 (3); and since this disobedience occurs in the "actual presence" of the judge it may be punished summarily under Rule 42 (a). If the witness, instead of disobeying the court's order in the actual presence of the judge, proceeds back to the grand jury room and there again refuses to answer the question which the court directed him to answer, this is still disobedience of a lawful order of the court within the meaning of 18 U. S. C. § 401 (3). But because such disobedience did not take place in the actual presence of the court, and thus could be made known to the court only by the taking of evidence, the court would have to conduct the proceeding in criminal contempt in accordance

with Rule 42 (b). See *Ex parte Savin*, 1889, 131 U. S. 267, 277, 9 S. Ct. 699, 33 L. Ed. 150.¹⁶

There is no doubt that, when petitioner, after having been directed by the court to answer, returned to the grand jury room and persisted in his refusal to answer, contempt proceedings could have been instituted under Rule 42 (b) which would have had to be on notice since such contempt would not have been in the presence of the court. *United States v. United Mine Workers*, 330 U. S. 258, 295-298; *Nye v. United States*, 313 U. S. 33, 40; *In re Fletcher*, 216 F. 2d 915 (C. A. 4), certiorari denied, 348 U. S. 931; *MacNeil v. United States*, 236 F. 2d 149 (C. A. 1), certiorari denied, 352 U. S. 912. Such a proceeding would have been necessary "to inform the court of events not within its own knowledge." *Sacher v. United States*, 343 U. S. 1, 9. But petitioner was deprived of no rights when the court chose instead to give petitioner one more chance to answer the questions in its presence and in the presence of the grand jury. At a hearing on notice after the refusal

¹⁶ The facts of *Carlson* and *Wong Gim Ying v. United States*, 231 F. 2d 776 (C. A. D. C.), are clearly distinguishable. The contempt citation in *Carlson* was based on a refusal to answer questions before a grand jury, without an intervening court hearing to determine the witness' legal obligation to answer, followed by a disobedience to the court's order. In *Wong Gim Ying*, after the witness refused to answer the questions, as in the case at bar, and after considering and overruling her claim of privilege, the court adjudged her in contempt forthwith. Neither case suggests that, after an initial disobedience to the court's order to return to the grand jury room and answer the questions, the court cannot then order the witness to answer the questions in the presence of the grand jury and summarily hold him in contempt on his refusal to obey such final order.

before the grand jury, the only factual issue would have been whether petitioner refused to answer.¹⁷ The fact that the court obviated the necessity for this proof by giving petitioner another chance certainly did not operate to his detriment. As for the opportunity to request the court to reconsider its original ruling which petitioner would have had at a Rule 42 (b) hearing, petitioner nevertheless had that opportunity since he was permitted to reargue the question at length.

As we have indicated above, the practice of the court in itself questioning the witness and seeking to elicit in the grand jury's behalf the information refused previously, prior to taking the final step of holding the witness in contempt, is a common procedure *supra*, pp. 36-37). It has long been held to be the preferable procedure, when a witness refuses to give testimony in the grand jury room, "that the jury themselves should go into court with the officer and the witness, that the questions may be stated, or the

¹⁷ Contrary to petitioner's statements (Pet. Br. 25), there were no controverted factual issues for trial. At the argument on the original ruling, the only evidence which petitioner's counsel tendered related to facts concerning other investigations which petitioner contended would demonstrate the incriminatory nature of the questions (R. 10-11). The court after extended argument on this issue properly held the tendered evidence to be irrelevant, finding the immunity provided for in 49 U. S. C. 305 (d) sufficient to immunize petitioner from the direct and collateral effects of his grand jury testimony. It then ordered petitioner to return to the grand jury (R. 34-35). Since petitioner's obligation to testify was thus the subject of a definite and unequivocal ruling, the only issue at a contempt hearing would have been whether petitioner willfully violated the order of the court.

decision of the court made, in the presence both of the jury and the witness." *Heard v. Pierce, supra* (62 Mass. at p. 345). There the grand jury may not only obtain the court's ruling in respect to the witness' claim of privilege, if any, but the application of "its compulsory power to enforce obedience." Thompson and Merriam, *Juries* (1882), p. 699; and see *United States v. Dachis*, 36 F. 2d 601 (S. D. N. Y.); *United States v. Hill*, 1 Brock. (Fed. Cas.) 156, 160 (per Mr. Chief Justice Marshall); *In re Belle Harris, supra*, 4 Utah Rep. at pp. 8-9; *Commonwealth v. Bannon*, 97 Mass. 214, 219. There is no injustice to the defendant in the endeavor by the court, prior to the imposition of the punitive or coercive remedy of contempt, to obtain the testimony without use of that more drastic expedient. Compare *Rogers v. United States, supra* (340 U. S. at p. 370, fn. 4). This procedure, far from depriving the grand jury witness of procedural rights, as petitioner argues, actually affords him a *locus poenitentiae* before the court is faced with the necessity of finding him in contempt. As this Court recently stated in *Yates v. United States*, 355 U. S. 66, 75, "the more salutary procedure would appear to be that a court should first apply coercive remedies in an effort to persuade a party to obey its orders, and only make use of the more drastic criminal sanctions when the disobedience continues." While the same end might be achieved in trying a contempt under Rule 42 (b), F. R. Crim. P., and including a purge clause in the judgment, that more extended procedure would less readily produce the information desired by the grand jury and, in addition, have the less desirable

result of attaching prematurely a badge of criminality to the recalcitrant witness. Moreover, as the Court of Appeals observed (R. 61):

There is good reason for providing for such summary procedure and for applying it to contumacious grand jury witnesses. The public interest requires that grand juries should suffer a minimum of delay in their investigations. Each delay of such an inquiry, however brief, multiplies the difficulties in getting facts, locating witnesses and finding the truth. Law enforcement faces enough difficulties without the added hazard of the unnecessary delays due to protracted hearings and adjournments which are not necessary. * * *

B. THE COURT HAD THE POWER TO PUT THE QUESTIONS TO THE WITNESS AND TO HOLD HIM IN CONTEMPT FOR HIS REFUSAL TO OBEY THE ORDER OF THE COURT

1. The power to compel the witness' testimony before the grand jury is, as we have shown (*supra*, pp. 37-38), a power of the court itself. The court, therefore, clearly had authority to put the questions to the witness, before the grand jury, rather than merely relying upon the report of what occurred before the grand jury. The court's power to hold witnesses who disobey its orders in contempt (*United States v. Hudson*, 7 Cranch. 32, 34) would surely include the power to allow the witness a final opportunity to comply with the court's order prior to the imposition of that sanction.

Petitioner's contention (Pet. Br. 28-30) that he had an absolute right as a defendant in a contempt proceeding not to take the stand, when, after disobey-

ing the court's order to testify before the grand jury on the second occasion he was brought again into court, misconceives the basis of the court's contempt citation. While petitioner's disobedience of the court's order to return and testify might have been made the basis of a contempt citation, the court chose not to regard the contempt as complete. Petitioner was called to the stand, not as a defendant to explain his prior acts of refusal before the grand jury, but rather as a grand jury witness. As the court pointed out, this proceeding was (R. 40) "a continuance of the grand jury proceeding before the Court".¹⁸ Had petitioner given the answers requested or indicated his willingness to respond to them in the grand jury room, contempt proceedings would have been obviated. His testimony would in no way have incriminated him either in respect to a possible contempt citation or in respect to possible prosecution for substantive crimes

¹⁸ Government counsel explained the nature of the proceedings prior to the petitioner's contempt as follows (R. 36-37):

"The Government's understanding of the nature of this proceeding is this: At this point the grand jury is still merely requesting the assistance of the Court. What the Government would request is that if it appears, as will be shown by the testimony of the grand jury reporter, that the witness is persisting in his refusal, the Government will then request of this Court that the Court itself, in the presence of the grand jury, will put the six questions to the witness and ask him, first, whether he is willing to answer them now, and second, would he answer them if he were sent back to the grand jury again. And if the witness again refuses here and now in the physical presence of the Court or persists in his refusal to answer, that the witness be held in summary contempt under Rule 42 (a) of the Federal Rules of Criminal Procedure.

2 "The COURT. That is what I propose."

against which the immunity protected. In short, prior to the contumacy before the court for which he was cited in contempt, petitioner was not a defendant, and, but for his final defiance of the authority of the court, he would not have been cited in contempt. Up to that time he had not committed the act for which he was found in contempt. It was this last act of refusal in the presence of the court which constituted the contempt charged, the court plainly stating that petitioner was in contempt by reason of his (R. 45) "refusal to answer in the actual presence of this Court". The court's certificate also alleges this final act of disobedience to the court's authority as the basis of the contempt (R. 4-5).

2. When petitioner, in the presence of the court, willfully disobeyed a valid order of that court, it was proper summarily to punish him for contempt.

This conduct in the presence of the court constituted "court-disturbing misconduct" occurring "in the court's immediate presence" of which the judge had "personal knowledge * * * acquired by his own observation of the contemptuous conduct", justifying the summary procedure followed. *In re Oliver*, 332 U. S. 257, 275. Here, "The judicial eye witnessed the act and the judicial mind comprehended all the circumstances of aggravation, provocation, or mitigation; and the fact being thus judicially established, it only remained for the judicial arm to inflict proper punishment." *Ex parte Terry*, 128 U. S. 289, 312.

Such behavior before the court constituting disobedience of the court's authority—after every opportunity had been afforded the witness to argue his

legal justification for his refusal and to comply with the demand for his testimony—constitutes that kind of conduct which the courts have historically deemed subject to the summary contempt procedures. As this Court said in *Fisher v. Pace*, 336 U. S. 155, 159-160:

Historically and rationally the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question. This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. Such summary conviction and punishment accords due process of law.

See also *Brown v. United States*, 356 U. S. 148, 152-153; *Yates v. United States*, 355 U. S. 66, 70-71; *In re Oliver*, *supra*, 333 U. S. at 274-275; *Cooke v. United States*, 267 U. S. 517, 534-536; *Eilenbecker v. District Court*, 134 U. S. 31, 36-37; *Ex parte Savin*, 131 U. S. 267, 277; Blackstone's *Commentaries*, pp. 1676-1679 (Lewis ed. 1897); Fox, *Contempt of Court* (1927), pp. 50-54.

C. PETITIONER CANNOT OBJECT TO THE SO-CALLED "SECRECY" OF THE
CONTEMPT PROCEEDINGS

For the first time in the Court of Appeals, petitioner raised the contention that the proceedings in the district court were invalid because they were conducted in "secrecy" (R. 62). Petitioner continues to urge this point although no contention is (or was) made that petitioner's counsel was not present at all relevant times and the record in fact indicates his presence and full participation in the proceedings.

With respect to the presence or absence of members of the public, the record is less clear. The record indicates that on the morning of April 5, 1957, prior to hearing the legal argument relative to petitioner's claim of privilege, Judge Levet ordered the courtroom cleared of all but the interested parties. Petitioner made no objection to this procedure, and the session which ensued is captioned in the record as a "colloquy between court and counsel" (R. 6). During this morning "colloquy," no testimony was taken on the application to the court to compel petitioner to answer the questions and the session was devoted to legal argument. It is manifest that this April 5 proceeding, which culminated only in the court's order directing petitioner to return to the grand jury room, could in no sense be considered a contempt proceeding since the contempt did not arise until April 8, 1957. See *Carlson v. United States*, *supra* (209 F. 2d at p. 217).

The record is silent as to whether the courtroom in which the April 8 proceedings took place was open or closed to the public. The court below, apparently assuming that the courtroom was closed on April 8 as it was on April 5, noted the presence of petitioner's counsel and petitioner's failure to object to the clearing of the courtroom and held that petitioner could not then complain of the procedure followed (R. 62). Petitioner has stated that it "cannot factually be disputed" that the courtroom was cleared on April 8 (Pet. Br. p. 31) and we have, therefore, endeavored to ascertain, outside of the record, what in fact took place. We are informed by the former Assistant

United States Attorney who was in charge of the case that the April 8 proceedings were conducted in the courtroom in which the criminal calendar is usually called. This courtroom is generally open to the public but at the time of these proceedings the calendar call had been completed and there were, in fact, no spectators in the courtroom. The district judge did not order the courtroom barred to the public; no members of the public sought admission during the proceedings; and petitioner's counsel made no explicit request with respect to the admission of the public.¹⁹ There was, therefore, no occasion for the trial judge to rule upon the question.

Regardless of whether a hearing conducted under the circumstances above described be denominated "open" or "closed," it is apparent that petitioner cannot object to this procedure for the first time in an appellate court. To the extent that the trial judge was continuing the grand jury inquiry, *i. e.*, asking the questions which petitioner had previously been asked in the grand jury room (R. 36-45), absence of the public would seem appropriate and in accord with the usual mode in which a grand jury operates. It should not be legally significant, in this regard, whether the trial judge physically goes to the grand jury room or the grand jurors go to a courtroom from which the public is absent. The only respect in which

¹⁹ The objection raised by petitioner in the district court was that the court should proceed on notice under Rule 42 (b). Paraphrasing that Rule, defense counsel requested that petitioner "be served or furnished with a notice in open court of the charges, the specifications and afforded an opportunity for a hearing, a full hearing" (R. 37).

the procedure here differed from that which might have prevailed had the judge gone to the grand jury room is that petitioner's counsel, and probably some court attendants, were present when the questions were put to petitioner by the court. But the petitioner can hardly object to the presence of his counsel; his complaint is that the proceedings were too secret, not too public. And, in any event, petitioner indicated that he would persist in his refusal to answer the questions were he to return to the grand jury room (R. 44).

Here, unlike the situation where contempts have been committed before judges sitting as one-man grand juries in secret session (cf. *In re Murchison*, 349 U. S. 133; *In re Oliver*, 333 U. S. 257), petitioner's contempt was committed in recorded proceedings at a time when he was represented by counsel. Up to this point the proceeding was, as we have pointed out (*supra*, pp. 43-45), essentially designed to afford petitioner a further opportunity to comply with the court's direction that he answer the questions before the court faced the necessity of adjudicating him in contempt.

If petitioner ever had a right to have the public present, in addition to his counsel, that right could only have arisen after it became apparent that, by virtue of his persistent refusal to testify, the inquiring function of the grand jury was thwarted and all that remained was the adjudication of contempt by the court. If petitioner had the right to have the public admitted (assuming, but not conceding, it had hitherto been barred) after his final refusal to

answer the questions, he not only failed to assert that right, but he cannot in any manner, real or hypothetical, demonstrate how he has been prejudiced by the procedures actually followed. All that took place after the judge indicated that in the light of petitioner's continued refusal to answer he was "forced to act upon this matter" (R. 45) was the reassertion by petitioner's counsel of his contention that the immunity provision did not apply and that the proceeding should be on notice (R. 45-47), and the court's adherence to its prior ruling. The adjudication of contempt (R. 47) and the sentence thereafter imposed (R. 49), of course, immediately became matters of public record and there was no attempt on the part of the court or counsel to conceal the proceedings. Since what took place at the final session on April 8, other than the legal argument upon which the court had previously made a definitive ruling, was essentially a continuation of the grand jury proceeding which, as we have seen, was properly conducted in the absence of the public, there was certainly no defect in the proceeding up to the time of sentencing. If for any reason the procedures followed upon sentencing were defective the proper remedy would be to remand the case to the district court for resentencing, not to vacate the adjudication of contempt.

IV

THE SENTENCE OF 15 MONTHS' IMPRISONMENT WAS NOT AN ABUSE OF THE DISTRICT COURT'S DISCRETION UNDER THE CIRCUMSTANCES

Petitioner also contends that his sentence of 15 months' imprisonment constitutes an abuse of the

court's discretion (Pet. Br. 31-32).²⁰ His argument on this point is (1) that other recalcitrant witnesses involved in other cases have received lesser sentences (although conceding that some have received longer) (Pet. Br. 31); (2) the criminal provisions of the Motor Carrier Act, Section 222 (49 U. S. C. 322) provide only for fines; and (3) the sentence failed to include a purge clause (Pet. Br. 32).

Petitioner's argument hardly justified his assertion that the district court, in imposing the 15-month sentence and the Court of Appeals in reviewing the judgment, abused their discretion. Whether the two courts below have committed such error cannot be resolved by a mathematical comparison of sentencing in other cases with the case at bar. This evaluation, which is the primary function of the trial court, depends on the peculiarities of each case and especially on " * * * the extent of the willful and deliberate defiance of the court's order [and] the seriousness of the consequences of the contumacious behaviour * * *." *Yates v. United States*, 355 U. S. 66, 75. The court in this case evidently regarded petitioner's conduct as motivated by a desire to obstruct the investigation. It was informed by government counsel that "[t]he

²⁰ Petitioner originally had contended, as did the petitioner in *Green v. United States*, No. 100, Oct. Term, 1957, that the sentencing power of federal courts in contempt proceedings was limited as a matter of law to one year's imprisonment, by virtue of the passage of the Clayton Act in 1914. That argument having since been rejected by this Court in *Green v. United States*, 356 U. S. 165, 180-183, he now abandons the contention and takes the position that his sentence was an abuse of discretion.

information that it is desired to elicit from this witness, I represent to the Court, is of the very greatest importance, and the witness' refusal to answer is a very great stumbling block to this investigation and to all these investigations" (R. 47). The court may well have felt that petitioner's behavior so effectively frustrated the grand jury's efforts and the court's ancillary power in its behalf that his contempt, as in *Green v. United States*, 356 U. S. 165, 188, "was by any standards a most egregious one."

The sentence of 15 months is by no means extraordinary in its severity as compared to other contempt case. *Green v. United States*, *supra*; *Hill v. United States ex rel. Weiner*, 300 U. S. 105, 106; *Lopiparo v. United States*, 216 F. 2d 87, 92 (C. A. 8), certiorari denied, 348 U. S. 916; *Warring v. Huff*, 122 F. 2d 641 (C. A. D. C.), certiorari denied, 314 U. S. 678; *Conley v. United States*, 59 F. 2d 929 (C. A. 8). And while this Court has, as it stated in *Green* case (356 U. S. at p. 188), "taken pains to emphasize its concern with the use to which the sentencing power has occasionally been put," by remanding ~~case~~ or modifying such sentences (cf. *Nilva v. United States*, 352 U. S. 385, 396; *Yates v. United States*, 356 U. S. 363, 366, 367), no special circumstances demonstrating that the district court rendered a sentence disproportionate to the contempt are present in this case.

Petitioner's further contention that the penalty provisions (49 U. S. C. 322) of the Motor Carrier Act provide only for fine (a factor he contends was overlooked by the Court of Appeals (Pet. Br. 32)) has no relevance, since no penalty there provided specifi-

cally reaches contempts of court, and thus no such exact basis of comparison is available. Cf. *Green v. United States*, *supra*, where this Court observed that the three-year contempt sentences, there involved, were well within the five-year maximum provided for the substantive offense of bail jumping (356 U. S. at p. 189). Petitioner's blocking of the investigation is different in character from the offenses defined by the Motor Carrier Act. In the circumstances of this case, the fifteen-month sentence was not beyond the bounds of the reasonable exercise of the district court's discretion. See *United States ex rel. Brown v. Lederer*, 140 F. 2d 136, 138-139 (C. A. 7), certiorari denied, 322 U. S. 734; *Creekmore v. United States*, 237 Fed. 743, 754-755 (C. A. 8).²¹

²¹ On the assumption that the 15-month sentence was intended by the court to be coercive rather than punitive, petitioner argues that it was incumbent on the court to provide a purge clause in the sentence. The sentence indicates, however, that the court considered petitioner's conduct to be obstructive and that the court intended to punish petitioner for his flouting of the authority of the court. The contempt was criminal. *United States v. United Mine Workers of America*, 330 U. S. 258, 296-300; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441-445; *Parker v. United States*, 153 F. 2d 66, 70-71 (C. A. 1). While the court might have provided for a purging of the punishment (cf. *Grant v. United States*, 227 U. S. 74, 78; *Lopiparo v. United States*, 216 F. 2d 87, 91 (C. A. 8), certiorari denied, 348 U. S. 916; *Ibid.*, 222 F. 2d 897 (C. A. 8); *United States v. Curcio*, *supra* (234 F. 2d 470 (C. A. 2))), its failure to do so did not invalidate the sentence. As the government counsel noted at the time sentence was imposed (R. 48), if at any time within 60 days from the termination of these proceedings petitioner desires to come forward with the testimony heretofore refused, the court can consider that fact in passing upon a motion for reduction of sentence under Rule 35 of the Federal Rules of Criminal Procedure.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed. .

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IN THE
Supreme Court of the United States

OCTOBER TERM—1958

No. 4

EMANUEL BROWN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

*To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of
the United States:*

Petitioner respectfully petitions for the rehearing of this Court's decision affirming his conviction for criminal contempt.¹

Petitioner's counsel are not unmindful that the Court has given lengthy consideration to this case and do not seek rehearing to reargue what is so ably and cogently set forth in the opinion of the Chief Justice, but rejected, by a majority of this Court.

Petitioner's counsel, however, would, in their opinion, be remiss in their duty to the Court and petitioner, if

1. This Court rendered its decision on March 9, 1959. The time under Rule 58 for filing this petition has not expired.

they did not call attention to certain basic considerations which arise because of the cast and thrust of this Court's opinion in this case.

By reason of the affirmance here and the shifting sands upon which it is bottomed, a vital conflict with other decisions of this Court has been created. This conflict can only lead to uncertainty and hazard in the administration of Federal criminal law and procedure. For this reason, rehearing is respectfully requested.²

I.

Although the doctrine of "purgation by oath" was finally and effectively rejected by this Court in *Clark v. United States*, 289 U. S. 1, 19, it has here been revived.

In that case, Mr. Justice Cardozo said that "little was left of that defense after the decision of this Court in *United States v. Shipp*, 203 U. S. 563, 574" that the doctrine "has even lost * * * the title to respect that comes of a long historical succession" and that "the time has come, we think, to renounce the doctrine altogether and stamp out its dying embers".

In spite of this unequivocal and decisive renunciation of "this intrusion or perversion of the canon law" [Holmes J., *United States v. Shipp*, 203 U. S. 563, 574], this Court has now breathed a smouldering life into its embers long ago thought to have been extinguished in the Federal Courts. See 41 *Harv. L. Rev.* 61; *People v. Gholson*, 412 Ill. 294.

Simple analysis of this Court's opinion demonstrates that by the affirmance here a life after death has been created for "purgation by oath."

2. Since this Court unanimously disagreed with petitioner's contentions as to the immunity statute, no attention will here be given to those points.



In this Court's opinion (p. 9) it is stated that petitioner "was for the first time guilty of contempt" when he again refused to answer the grand jury's questions "upon his return to the grand jury room after the District Court had ruled on the question of immunity." Thus, we have then and there a complete crime prosecutable by notice and hearing under Rule 42(b).

But, this Court goes on to hold that the District Court could then put petitioner on the stand and afford him the opportunity to purge this completed crime of contempt by his answering the grand jury's questions before the Judge—clearly, purgation by oath and that, if petitioner refused, as he did, to purge himself, he was guilty of contempt summarily punishable under Rule 42(a).

In *United States v. Brewster*, 154 F. Supp. 126 [*reversed on other grounds*, 255 F. 2d 899 (C. A., D. C.)] the defendant on an indictment for contempt of the United States Senate argued that, even if he had been in contempt in refusing to answer certain questions before a subcommittee, he had nevertheless "purged" himself by subsequently furnishing the required information to the Select Committee. The District Court, holding that the contempt was criminal, stated that "the defense of purging in criminal contempt has been abolished" and that "this defense is no longer valid."

If *Clark v. United States*, *supra*, is still the law, then the decision in this case is in direct conflict therewith. If the *Clark* case had been followed in this case, this Court could not conclude that, if petitioner had answered the grand jury's questions before the Judge, he would have purged himself of his contempt before the grand jury.

Particularly apposite here, because its conflict in principle with this case is so clear, is this Court's decision in *United States v. Norris*, 300 U. S. 564. There, in a trial

for perjury the defense was urged that before the same tribunal the witness had retracted and corrected his falsehoods and thus his crime was purged.

This Court gave the perjurer no *locus poenitentiae*—it held the perjury complete when uttered and hence indictable and not subject to purgation.³

So here, too, there is and was no real place of penitence for petitioner for his overt refusal to answer in the grand jury room—unless the *Norris* and *Clark* cases, *supra*, are to be deemed overruled, in order to sustain a conviction which avoids and evades due process.

Nor is the impact of the *Clark* and *Norris* cases, *supra*, overcome or even blunted by the theory adopted by the Court here of a “continuing contempt”—more accurately described as an “open-end” crime.

The Court in holding (pp. 9, 10) that petitioner’s refusal to answer before the Judge was an act “continuing ~~is~~ contempt” has necessarily overlooked (1) that it had held that petitioner could have been prosecuted under Rule 42(b) for criminal contempt for his refusal to answer in the grand jury room after the Court’s direction to answer and (2) that under the *Clark* and *Norris* cases, *supra*, petitioner can still be so prosecuted.

It cannot be said that the crime of criminal contempt was not complete when done in the grand jury room.⁴

3. Nor does restitution purge a larceny. *People v. Kaye*, 295 N. Y. 9, 13; 52 L.R.A. (N. S.) 1013, 1019, 1023.

4. It would seem that this problem may have been avoided in *Yates*, 355 U. S. 66, 74, by the holding that there was one contempt albeit a continuing one. There this Court pointed out that the conviction for the acts initiating the contempt had been reversed by the Court of Appeals (*Yates, supra*, 74). There being no outstanding conviction for the primary refusal in that case, the Court was able to “roll-up” or merge all the refusals into one contempt. Thus, if it were possible to reinstitute proceedings against Mrs. Yates for her first refusal to answer, she would have a defense of former jeopardy. Here petitioner can have no such defense—as the Court has made it especially clear that his refusal in the grand jury room was prosecuta-

If that were so, this Court could not say, as it did (pp. 9, 10) that petitioner could be prosecuted for the refusal in the grand jury room. The crime could not be both complete and incomplete.

There necessarily had to be two contempts—the one before the grand jury and the one before the Court. The contempt before the grand jury was an entirely separate crime from the contempt before the Court, of which he was convicted. But petitioner by the affirmance here on the theory of continuing contempt stands convicted of a crime other than either one of the two which he may have committed.

The certificate of the Trial Judge makes this indisputable. In no way does the certificate show that petitioner was convicted below for continuing before the Court his overt refusals before the grand jury.

This certificate (R. pp. 4, 5) makes no reference whatsoever to the proceedings before the grand jury, after the Court's direction to petitioner to answer the questions. It recites (R. p. 5) merely that the petitioner was brought before the Judge and that in the presence of the grand jury, the Judge put the questions to him, that he refused to answer after having been directed to do so, that he failed to state any valid reason why he should not be held in contempt, and that accordingly petitioner was summarily found to be in contempt of Court under Rule 42(a).

Then this Court, in order to avoid the problem of multiplication of contempts clearly inherent in this case,

ble, but under Rule 42(b). Nor has the Court held that petitioner's refusals to answer both before the grand jury and the District Court were together a single contempt. If the Court had so held, then unlike the continuing contempt in *Yates*, where all phases occurred in the actual presence of the Court, the prosecution here would have had to be under Rule 42(b) as a portion of the contempt did not occur in the presence of the Court, but in the grand jury room,

describes the crime as a continuing contempt. But for this so-called continuing contempt petitioner was not convicted. If he had been convicted of this continuing contempt, then the certificate would have had to recite the proceedings before the grand jury. This it very carefully does not do. The Assistant United States Attorney who prepared the certificate (R. p. 50) and the District Court Judge who signed it were undoubtedly well aware of the fact that to include the grand jury proceedings in the certificate would necessarily invalidate it, because then, as pointed out by this Court, there would have had to be proceedings under Rule 42(b) and the error would appear plainly on the face of the certificate.

Accordingly, if this Court means to supply the defect in the Rule 42(a) procedure here by adding to the certificate the matter contained in the Record as to the proceedings before the grand jury, then the certificate as so amended *ad hoc* is invalid and the conviction must fall. There would seem to be no disagreement in this Court about this basic rule that, if the proceedings resulting in a contempt took place before a grand jury in its room, then Rule 42(b) must be applied.

And this is a basic distinction between this case and *Yates*, 355 U. S. 66. There the continuing contempt occurred before the same tribunal.⁵ Here, while the grand jury concededly is an appendage of the Court, proceedings before it are not the same as proceedings before the Court, and for the Court to take cognizance of contumacious conduct before the grand jury, proceedings under

5. Moreover, while in the *Yates* case, *supra*, the adjudication was ostensibly under Rule 42(a), Mrs. Yates was given oral notice of her prospective adjudication of criminal contempt (*Ibid*, 69) and a certificate equivalent to specifications as required by Rule 42(b) (*Yates*, 227 F. 2d 851, 852) was filed by the Trial Judge and a month later she received a hearing whereat she was present and represented by counsel (*Yates*, 227 F. 2d 851, 852); only after this hearing was completed, was Mrs. Yates adjudicated in contempt.

Rule 42(b) must be instituted. By the device of labeling the petitioner's refusal to answer before the District Judge as a continuation of the contempt before the grand jury, this basic difference cannot be obscured.

Even if this Court, by describing the petitioner's refusals as a continuing contempt, intends to imply that the proceedings before the Court were a continuation of the grand jury proceedings, the error is not cured thereby, because what transpired before the grand jury took place outside of the presence of the Court, and in this phase of the contempt petitioner was certainly entitled to notice and hearing. Thus, the "rollup" or merger of the refusal before the grand jury into the alleged contempt before the Court which is implied in this Court's phrase "finally adjudicating" (Op., p. 11) is impossible.

In sum, this Court holds that petitioner's conviction can stand because he refused to purge himself, when as matter of law long settled by this Court, he could not have purged himself of his contempt in the grand jury room. By answering before the Court he could at the most only avoid a coercive sentence or mitigate his punishment for his contempt before the grand jury. *Wilson v. United States*, 65 F. 2d 621 (C.C.A.) 3; *United States v. Collins*, 146 Fed. 553, 554.

Petitioner thus faces not only an inordinately lengthy sentence but also what is in substance and fact double jeopardy for the same contempt—a necessary consequence of the multiplication of contempts sanctioned here.*

II.

In holding that petitioner's refusal before the District Judge to answer the grand jury's questions "left the

6. The improbability or slight possibility of prosecution for the other contempt is no solution for petitioner's "awkward" situation. Cf. *United States v. Miranti*, 253 F. 2d 135, 138, 139 (C. A. 2).

Court no choice" but to convict him of criminal contempt under Rule 42(a), this Court has overlooked, it is respectfully submitted, the power in the District Court to commit the petitioner until he make answer to these questions.

At page 8 of its opinion, this Court in restating petitioner's argument asserts that petitioner argued that on his disobedience to the Court's order in the grand jury room the District Court had no choice but to initiate criminal contempt proceedings against him at once under Rule 42(b). This, it is respectfully submitted, is not petitioner's contention.

It is petitioner's contention that for the contempt committed in the grand jury room, he could only be prosecuted and punished under Rule 42(b), but that for the purpose of obtaining his answers to the questions and aiding and assisting the grand jury to that end, the District Court only could commit him until he should make answer thereto. Petitioner has not sought here to have the Court create a vacuum of power and he does not deny the District Court's coercive power to commit him until he make answer. Petitioner does contend that he could not and should not be convicted summarily of criminal contempt under Rule 42(a) for not having answered the grand jury's questions before the District Court.

This Court to justify its upholding of this abuse of the summary contempt power, has cited a number of decisions of this Court and the Courts of Appeals as "at least *sub silentio*" approving "such a procedure" which its opinion describes as "stemming * * * from usages of the common law."

Of the cited cases decided in this Court, not one, openly or silently, furnishes such approval of such summary procedures culminating in punitive sentences for contempt.

In *Hale v. Henkel*, 201 U. S. 43, 46, the coercive order of the Circuit Judge committed Hale "to the custody of

the Marshal until he should answer the questions and produce the papers". Similarly, in *Wilson v. United States*, 221 U. S. 361, 369, 371, the commitment was to the custody of the Marshal until the witness shall perform the required acts. In *Curcio v. United States*, 354 U. S. 118, this Court did not approve the procedure there followed and necessarily did not consider that issue, because its sustaining of the Fifth Amendment plea disposed finally of the case. Besides there the 6 months sentence contained a blanket purge provision.

Much is attempted to be made of *Rogers v. United States*, 340 U. S. 367, in the Court's opinion here, page 10, footnotes 13 and 14. Because of this, petitioner's counsel have reread the petition for rehearing in the *Rogers* case and we respectfully submit to this Court that all that was presented on the procedural question in that case was whether that petitioner had a right to counsel in a Rule 42(a) proceeding and whether that right to counsel had been infringed by the summary proceedings there followed. The fundamental questions presented in this case were not at all submitted to the Court in the *Rogers* case. To show that only the right to counsel was involved in the *Rogers* case, it is necessary only to quote from the next to last sentence of that petition for rehearing, at page 11. This sentence is, "We hope and trust that this court will listen to our plea against this apparent denial by the trial court of so basic a right as the right to be heard by counsel before pronouncement of judgment."

Lopiparo v. United States, 216 F. 2d 87, is one of the Courts of Appeals cases cited by the Court as representing approval of the summary contempt procedure followed here. There, however, sentence was not to the penitentiary, but to the custody of the Marshal for 18 months or until the further order of the Court should the contemnor produce before the grand jury the required records

before the expiration of the sentence or the discharge of the grand jury—in effect, a coercive sentence.

In *United States v. Weinberg*, 65 F. 2d 394, while the sentence was for a determinate period, the contemnor unlike this petitioner was prosecuted on presentment by the grand jury.

As to the earlier practice at common law, the cited case of *People ex rel. Phelps v. Fancher*, 4 Thompson & Cook 467, involved a commitment until the witness should answer. *People ex rel. Hackley v. Kelly*, 24 N. Y. 74, is also to be distinguished because it is quite clear that the Court of Appeals held on the record there that the relator had waived all procedural issues “in order to have a prompt determination of the constitutional question involved.”

In *Re Belle Harris*, 4 Utah 5, the Court there exercised the power of coercion by committing the witness until she should answer the questions. Besides, this case arose under the Utah Territory statute and not at common law.

In overlooking this clear and unmistakable power of the Court to commit the petitioner until he make answer to the grand jury's questions, this Court has been led into the error of sanctioning a procedure wholly violative of due process and totally inconsistent with its statement of the purpose of summary proceedings before the Court.

At page 9 of its opinion, this Court says that a “judge more intent upon punishing the witness than aiding the grand jury in its investigation might well have taken” the course of instituting prosecution of petitioner for criminal contempt under Rule 42(b), but instead the District Court “made another effort to induce the petitioner to testify.”

The punishment under the Rule 42(a) proceeding being deemed punitive and not coercive, how can it be said on the one hand that the Court was seeking to induce the petitioner to testify and on the other hand not seeking to punish the witness? The necessary sequel to this

Court's statement that the intent of the District Court in pursuance of a proper attitude was to induce the petitioner to testify would necessarily have been for the Court to exercise its coercive power and to commit the petitioner until he answer the grand jury questions and not to conduct proceedings under Rule 42(a).

While it would seem that the Court's statement is intended to be a rephrasing in the terms of this case of certain language in *Yates v. United States*, 355 U. S. 66, 75, the proceedings in this case do not at all accord with the phraseology of *Yates*. There, Mr. Justice Clark said, "The more salutary procedure would appear to be that the court should first apply coercive remedies in an effort to persuade a party to obey its orders and only make use of the more drastic criminal sanctions when the disobedience continues." Here, however, there was no imposition of coercive remedies, only a substitution of the more drastic criminal sanctions for the coercive remedies.

If the District Court had applied the coercive remedies and no answers resulted within a reasonable time, it still remained open to commence a prosecution of the petitioner under Rule 42(b) for his overt refusal in the grand jury room.⁷ But the District Court did not apply any coercive remedies, and thus in reality proceedings inconsistent with this Court's expression in the *Yates* case, *supra*, have been here sanctioned.

III.

On the question of the sentence here, this Court first states that the length of sentence "is one primarily for the District Court, to be made 'with the utmost sense of

7. The coercive sentence, if one had been given, would then, unlike the instant punitive sentence, present "no double jeopardy problem." *Yates v. United States*, 355 U. S. 66, 74. See fn. 4, *supra*, p. 4.

responsibility and circumspection'” and then that the “record does not indicate that the district judge’s decision was otherwise reached”. This circumspect negative statement by the Court is, indeed, indicative of the fact that the record does not at all show that the district judge had in mind his obligation to use the utmost sense of responsibility and circumspection or that he did so act.

The key to the Court’s attitude is indicated by the Record on the question of bail (R. pp. 49-51).

CONCLUSION

For all of the above, rehearing should be allowed and the conviction reversed.

Respectfully submitted,

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Certificate

It is hereby certified that the foregoing petition for rehearing is presented in good faith and not for delay.

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.....
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